IN THE

Supreme Court of the United States

October Term, 1975

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SUPREME COURT, U.S.

No. 75-1174

TIME, INC., *Petitioner,*

v.

MICHAEL S. VIRGIL, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TABLE OF CONTENTS

	PAGE
OPINIONS AND ORDERS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS INVOLVED	4
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	7
1. The need for a proper constitutional standard in the privacy field	8
2. Application of the proper standard should be a matter of law for the court	14
CONCLUSION	17
APPENDIX A Opinion and order of the United States Court of Appeals for the Ninth Circuit of December 5, 1975	A1
APPENDIX B Judgment of the United States Court of Appeals for the Ninth Circuit of December 5, 1975	B1
APPENDIX C Opinion and order of the United States District Court for the Southern District of California of August 18, 1972	C1
APPENDIX D Pages 71-72 of Sports Illustrated article of February 22, 1971, titled "The Closest Thing to Being Born"	D1

TABLE OF AUTHORITIES

PAGE

CASES:

Alioto v. *Cowles Communications, Inc.*, 519 F. 2d 777 (9th Cir. 1975), *cert. denied*, U. S. , 96 Sup. Ct. 280 ..... 16, 17

Beckley Newspapers v. *Hanks*, 389 U. S. 81 ..... 2, 16

Bigelow v. *Virginia*, 421 U. S. 809 ..... 2, 3, 13

Bon Air Hotel, Inc. v. *Time, Inc.*, 426 F. 2d 858 (5th Cir. 1970) 17

Cantrell v. *Forest City Publishing Co.*, 419 U. S. 245 ..... 2, 3, 14

Cantrell v. *Forest City Publishing Co.*, 484 F. 2d 150 (6th Cir. 1973), *rev'd and remanded*, 419 U. S. 245 ..... 3, 13, 14

Cox Broadcasting Corp. v. *Cohn*, 420 U. S. 469 ..... 2, 3, 6, 9, 14

Curtis Publishing Co. v. *Butts*, 388 U. S. 130 ..... 2, 15, 16

Donahue v. *Warner Bros. Pictures Distributing Corp.*, 272 P. 2d 177 (Sup. Ct. Utah 1954) 9

Garrison v. *Louisiana*, 379 U. S. 64 ..... 2, 3, 16

Gertz v. *Robert Welch, Inc.*, 418 U. S. 323 ..... 2, 3, 9, 13, 14, 16

Greenbelt Pub. Assn. v. *Bresler*, 398 U. S. 6 ..... 2, 16

Guam Federation of Teachers v. *Ysrael*, 492 F. 2d 438 (9th Cir. 1974), *cert. denied*, 419 U. S. 872 ..... 16, 17

Henry v. *Collins*, 380 U. S. 356 ..... 2, 16

Jackson v. *Denno*, 378 U. S. 368 15

Jenkins v. *Georgia*, 418 U. S. 153 ..... 2, 13

Kois v. *Wisconsin*, 408 U. S. 229 ..... 2, 13

Miami Herald Publishing Co. v. *Tornillo*, 418 U. S. 241 ..... 2, 10, 11, 14

Miller v. *California*, 413 U. S. 15 ..... 2, 3, 13

Monitor Patriot Co. v. *Roy*, 401 U. S. 265 ..... 2, 15, 16

BLEED THROUGH

PAGE

New York Times Co. v. *Sullivan*, 376 U. S. 254 ..... 2, 8, 15, 16

Ocala Star-Banner Co. v. *Damron*, 401 U. S. 295 .. 2, 16

Pape v. *Time, Incorporated*, 294 F. Supp. 1087 (N. D. Ill. 1969) 17

Rosenblatt v. *Baer*, 383 U. S. 75 ..... 2, 15, 16

Rosenbloom v. *Metromedia*, 403 U. S. 29 ..... 2, 11

Sidis v. *F-R. Pub. Corporation*, 113 F. 2d 806 (2d Cir. 1940), *cert. denied*, 311 U. S. 711 17

Time, Inc. v. *Hill*, 385 U. S. 374 .... 2, 3, 9, 11, 12, 13

Time, Inc. v. *Pape*, 401 U. S. 279 ..... 2, 15, 16, 17

Wasserman v. *Time, Inc.*, 424 F. 2d 920 (D. C. Cir. 1970), *cert. denied*, 398 U. S. 940 17

Winters v. *New York*, 333 U. S. 507 ..... 2, 11

UNITED STATES CONSTITUTION:

Amendment I 2, 3, 4, 7, 8, 9, 10, 12, 15

Amendment XIV § 1 ..... 4, 9

UNITED STATES STATUTES:

28 U. S. C. § 1254(1) 2

28 U. S. C. § 1292(b) 6

OTHER AUTHORITIES:

Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW AND CONTEMP. PROB. 326 (1966) 9

Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960) .. 8, 11, 17, 18

Restatement (Second) of Torts (Tent. Draft No. 13, April 27, 1967) 12

Restatement (Second) of Torts (Tent. Draft No. 21, April 15, 1975) 12

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v.

MICHAEL S. VIRGIL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner Time, Inc., respectfully prays that a writ of certiorari issue to review the opinion and order of the United States Court of Appeals for the Ninth Circuit of December 5, 1975, which vacated an order denying petitioner's motion for summary judgment previously rendered by the United States District Court for the Southern District of California on August 18, 1972, declined as a matter of law to order summary judgment for petitioner and remanded the action to the District Court for reconsideration of the motion in the light of the views expressed by the Ninth Circuit in its opinion regarding factual questions to be decided by a jury.

OPINIONS AND ORDERS BELOW

The opinion and order of the United States Court of Appeals for the Ninth Circuit of December 5, 1975, is not officially reported and is attached as Appendix A. The judgment of that Court, entered the same day, is attached as Appendix B.

The opinion and order of the United States District Court for the Southern District of California of August 18, 1972, is not officially reported and is attached as Appendix C.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on December 5, 1975. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).*

QUESTIONS PRESENTED

This case presents a truthful disclosure of nondefamatory private facts concerning a private individual rationally related to a subject which was newsworthy and of public interest and which is directly covered by question No. 1 to counsel in *Hill*** (fn. 6, p. 382): "Is the truthful

*A final judgment is, of course, not a jurisdictional prerequisite for cases coming from the Courts of Appeals, and this Court has jurisdiction even though the judgment below remands the case for reconsideration of petitioner's motion for summary judgment. Moreover, jurisdiction should be exercised here because of the important First Amendment questions presented. *Cf., Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241, 247 n. 6, and *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469, 484-87, where jurisdiction was exercised for similar reasons over state court judgments remanding for further proceedings. The Court of Appeals has ordered a stay of its mandate pending disposition by this Court of this petition and if the petition is granted pending this Court's final determination of the case.

**For brevity and ease of reading we shall refer in this petition by their shorthand names, *i.e.*, *New York Times*, *Butts*, *Gertz*, etc., to the 21 First Amendment decisions of this Court upon which we place primary reliance in this petition. Those cases include *Winters* v. *New York*, 333 U. S. 507; *New York Times Co.* v. *Sullivan*, 376 U. S. 254; *Garrison* v. *Louisiana*, 379 U. S. 64; *Henry* v. *Collins*, 380 U. S. 356; *Rosenblatt* v. *Baer*, 383 U. S. 75; *Time, Inc.* v. *Hill*, 385 U. S. 374; *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130; *Beckley Newspapers* v. *Hanks*, 389 U. S. 81; *Greenbelt Pub. Assn.* v. *Bresler*, 398 U. S. 6; *Monitor Patriot Co.* v. *Roy*, 401 U. S. 265; *Time, Inc.* v. *Pape*, 401 U. S. 279; *Ocala Star-Banner Co.* v. *Damron*, 401 U. S. 295; *Rosenbloom* v. *Metromedia*, 403 U. S. 29; *Kois* v. *Wisconsin*, 408 U. S. 229; *Miller* v. *California*, 413 U. S. 15; *Jenkins* v. *Georgia*, 418 U. S. 153; *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241; *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323; *Cantrell* v. *Forest City Publishing Co.*, 419 U. S. 245; *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469; *Bigelow* v. *Virginia*, 421 U. S. 809.

BLEED THROUGH

presentation of a newsworthy item ever actionable . . .?" *Hill* expressly left open the question of truthful disclosure of private facts (fn. 7, p. 383), as had *Garrison* before it (fn. 8, p. 72), *Cox Broadcasting* most recently (p. 491) and, inferentially, *Gertz* (p. 348) and *Cantrell* (p. 250).

The background question, as stated by this Court in *Cox Broadcasting* (p. 491), is "whether truthful publications may ever be subjected to civil or criminal liability consistently with the First and Fourteenth Amendments, or to put it another way, whether the State may ever define and protect an area of privacy free from unwanted publicity in the press . . ." We assume the answer to that question is in the affirmative. It certainly should be in order to preserve a proper balance between the rights of the individual and the rights of the press. On that assumption, then, the questions presented are:

1. What is the standard of constitutional protection for truthful public disclosure of private facts?*

2. Is application of that standard a question of law for a court or a question of fact for a jury?**

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*There are subsidiary questions pertinent to this first inquiry. Is the test of "offensiveness" applied below a proper standard, or should the standard instead be the "public interest" standard of *Hill*, the "editor's discretion" standard of the Sixth Circuit in *Cantrell* (484 F. 2d pp. 156-57), the "commerce in ideas" standard used by this Court for obscenity in *Miller* and for advertising in *Bigelow*, or some other alternative?

**There are likewise subsidiary questions pertinent to the second inquiry. Would not reference of the question of "offensiveness" to a jury as suggested by the Ninth Circuit enable a jury to institute a system of censorship and punish unpopular ideas? Since this Court has determined as a matter of law in applying First Amendment standards that attributes of the content or act of publication as tested against a constitutional standard should be decided by a court as a matter of law rather than by a jury as a matter of fact, should not the Ninth Circuit have made its determination as a matter of law? Does not the publication upon which this action is founded conform as a matter of law to any standard which may be set by this Court so that this action should be dismissed?

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the First and Fourteenth Amendments, United States Constitution, Amendment I, Amendment XIV, § 1.

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U. S. Const., amend. I.
>
> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U. S. Const., amend. XIV, § 1.

STATEMENT OF THE CASE

This is an action for invasion of privacy in which respondent seeks $2,000,000 in compensatory damages and $10,000,000 in punitive damages. The pertinent facts are simple and undisputed. They are set forth in the opinion of the District Court (App. C, pp. 1-5) and repeated verbatim by the Court of Appeals (App. A, pp. 1-5).* Accordingly, only the highlights need be stated here.

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*The details stated in the opinions below are amplified in materials submitted by petitioner in support of its motion for summary judgment. These materials were (1) the Editorial Reference File which contained the article, all material on which the article was based, including the reporter's notes, and all drafts of the article, and (2) affidavits by the editorial personnel involved in the article—the writer, the researcher and the supervising editors, all of whom stated their belief that the article was entirely true.

BLEED THROUGH

The article complained of appeared in the February 22, 1971, issue of Sports Illustrated. It dealt with the sport of body surfing at "The Wedge", a public beach near Newport Beach, California, reputedly the world's most dangerous site for body surfing. Respondent, who was acknowledged to be the most daring surfer at The Wedge, willingly gave extensive interviews to the writer of the article. Respondent does not dispute the accuracy of the statements about him in the article. He did ask, when the article was being checked before publication, that he not be mentioned in the story. The article was nevertheless published following approval by petitioner's editorial staff and counsel who were satisfied that respondent had given the information freely and with full knowledge that it was to be used for publication.

The portions of the article about which respondent complains appear in the last two pages of the eleven page article. They consist of a series of personal incidents, all willingly told by respondent, which were included in the article to explain respondent's daredevil antics at The Wedge. They appear immediately after the explanatory sentence: "Virgil's carefree style at The Wedge appears to have emanated from some escapades in his younger days."*

This action was begun in the state courts of California and removed to the federal courts on diversity grounds. In its answer, petitioner asserted that the article

*The opinion of the Court of Appeals extracts these personal incidents from the article (App. A, fn. 1, pp. 4-5). Since those extracts, out of context, are misleading and fail to show the relevance of the incidents to the subject of the article, we attach as Appendix D the complete text of the last two pages of the article, which are the only pages in which respondent is mentioned. It is important that this Appendix D be read in order fully to understand our constitutional argument. Out of context the extracts may appear frivolous. In context, however, the extracts are important in explaining the feats of respondent in his chosen, and public, activity. A copy of the entire article is also being submitted with this petition.

was protected by the Constitution. Subsequently petitioner moved for summary judgment on those constitutional grounds. The District Court denied that motion. That Court found that the subject matter of the article, body surfing at The Wedge, was a matter of public interest (App. C, pp. 8, 10). However, it ruled that a jury should pass on whether the publication of the incidents concerning respondent's private life was newsworthy and whether those incidents were relevant to the public interest subject matter of the article. Because of the importance of the constitutional questions involved, the courts below permitted petitioner to appeal under 28 U. S. C. § 1292(b) from the denial of its motion for summary judgment.

The appeal was argued before the Ninth Circuit on December 9, 1973, and that Court rendered its opinion and order on December 5, 1975.*

That Court failed to reverse and dismiss, as petitioner had requested. Instead, it vacated the denial of summary judgment and remanded the case to the District Court for further consideration concerning factual questions to be decided by a jury. Like the District Court, the Court of Appeals found that "body surfing at The Wedge" is "newsworthy" "as a matter of law" (App. A, p. 17). It also found specifically that the private facts information "was obtained without commission of a tort and in a manner wholly unobjectionable" (App. A, p. 8) and that petitioner's reporter "did not intrude on appellee's solitude and that all interviews were freely given" (App. A, fn. 3, p. 6). The Court also narrowed the issue presented by finding that respondent had "expressly abandoned" any "false

*On April 10, 1974, the Ninth Circuit withheld further consideration of the appeal pending decision by this Court in *Cox Broadcasting*, which presented the possibility that the questions involved in this action would be decided in that case. This Court rendered its decision in *Cox Broadcasting* on March 3, 1975, but specifically declined to pass on those questions (p. 491). The Ninth Circuit then resumed its consideration.

BLEED THROUGH

light" theory (App. A, fn. 3, p. 6) and that respondent had denied "that this is a libel action" (App. A, fn. 3, p. 6). The Court correctly stated that its search was for "a standard for newsworthiness" (App. A, p. 14).

The Court then ruled that the standard for constitutional protection for public disclosure of private facts is as follows (App. A, p. 14):

> " 'The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern * * *' "

Having defined the standard, the Court declined to decide the case as a matter of law (App. A, p. 16) and remanded the case to the District Court for it to decide whether a jury could find whether or not the private facts printed "are matters in which the public has a legitimate interest" and whether or not "the publicizing of these facts would prove highly offensive to a reasonable person—one of ordinary sensibilities" (App. A., p. 18).

REASONS FOR GRANTING THE WRIT

This case presents important First Amendment questions which have not been but should be resolved by this Court for the guidance and the protection of the press. Moreover, these questions—the constitutional standard to be applied in privacy actions for truthful public disclosure of private facts, and whether the application of that standard should be determined by the court as a matter of law—were wrongly decided below, in a manner which is not only inconsistent with prior relevant decisions of this Court but which also conflicts with the decisions of other circuits. Unless the result below is corrected, litigants like respondent will bring privacy rather than libel actions, and the

constitutional safeguards which this Court has so carefully erected in the defamation field will go for naught as the press is left unprotected against privacy actions.

1. The need for a proper constitutional standard in the privacy field.

Now that the tort territory of defamation has been made to bend to the demands of the First Amendment, the tort territory of privacy must make, at the very least, a comparable yielding. Dean Prosser made this abundantly clear in a perceptive article written four years before the seminal decision in *New York Times*. He pointed out how the safeguards for press freedom erected in the defamation field were being outflanked by the law of privacy, and he asked, "where, if anywhere, we are to call a halt".* The

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*Because of its extreme pertinency we include the following extensive quotation from Dean Prosser's article, *Privacy*, 48 CALIF. L. REV. 383, 422-23 (1960):

> "The public disclosure of private facts, and putting the plaintiff in a false light in the public eye, both concern the interest in reputation, and move into the field occupied by defamation. Here, as a result of some centuries of conflict, there have been jealous safeguards thrown about the freedom of speech and of the press, which are now turned on the left flank. Gone is the defense of truth, and the defendant is held liable for the publication of entirely accurate statements of fact, without any wrongful motive. . . . Perhaps more important still is the extent to which, under any test of 'ordinary sensibilities,' or the 'mores' of the community as to what is acceptable and proper, the courts, although cautiously and reluctantly, have accepted a power of censorship over what the public may be permitted to read, extending very much beyond that which they have always had under the law of defamation.
>
> ". . . .
>
> "This is not to say that the developments in the law of privacy are wrong. Undoubtedly they have been supported by genuine public demand and lively public feeling, and made necessary by real abuses on the part of defendants who have brought it all upon themselves. It is to say rather that it is high time that we realize what we are doing, and give some consideration to the question of where, if anywhere, we are to call a halt."

BLEED THROUGH

time has come to call that halt, or to at least consider doing so, particularly since the strides for constitutional protection in the privacy field made by this Court in *Hill* now seem in question.*

If appropriate constitutional protection is not afforded in the privacy field, all that a libel plaintiff need do is not contest the truth of the facts, bring suit on a "disclosure of private facts" theory and recover. And, that is why this Court should deal with the question left open in *Cox Broadcasting* (p. 491) and either rule that truthful publications may never be subjected to civil or criminal sanctions** (a view to which we do not subscribe and which we do not urge) or set a standard. That which is newsworthy must be protected if the First and Fourteenth Amendments are to have validity. As the Ninth Circuit quite correctly noted (App. A., p. 14) we must find "a standard for newsworthiness". But the Ninth Circuit not only failed to define a useable standard but also failed to recognize that application of a standard is a matter of law.

In the present case, petitioner published a newsworthy article dealing with a newsworthy subject. The private facts, publication of which is the basis of this action, were included in the article as an explanation of the foolhardy feats performed by respondent in full public view before a multitude of spectators on the most dangerous beach in the world. Such a publication, without more, should be entitled to constitutional protection. Thus, what is involved in this case is the right of an editor to exercise his discretion to utilize private facts "freely given" (App. A, fn. 3, p. 6) by respondent and obtained by petitioner "in a man-

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*E.g., Mr. Justice Powell stated in his concurring opinion in *Cox Broadcasting* (fn. 2, p. 498), that the decision in *Gertz* "calls into question the conceptual basis of *Time, Inc.* v. *Hill*."

**Compare Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW AND CONTEMP. PROB. 326 (1966); *Donahue* v. *Warner Bros. Pictures Distributing Corp.*, 272 P. 2d 177 (Sup. Ct. Utah 1954).

ner wholly unobjectionable" (App. A, p. 8) in order to explain those foolhardy feats. If the decision by this Court in *Tornillo* is to mean anything, petitioner had the right so to exercise its editorial discretion and cannot be deprived of that right by reason of the private nature of those freely given facts.

The right of privacy is also a fundamental right, the protection of which perhaps requires that the First Amendment safeguards of expression in this area not be rendered absolute. By attempting to resolve the conflicting rights here involved, it is possible to derive a principle that would protect both rights—that would protect publication of news (in its broadest sense) bearing a logical connection to the person identified, but would not protect private facts utilized solely for commercial advantage.

This case is the appropriate vehicle for deriving that principle. The issues are presented with precision on undisputed facts which show the absence of abusive practices—all facts about the publication itself, and the acts taken by petitioner's editorial personnel in connection with that publication, and the "wholly unobjectionable" manner in which the private facts were obtained are fully before the Court. Moreover, review is needed because the standard adopted below fails to strike an appropriate balance between freedom of the press and the right of privacy in several respects:

a. That standard—which draws the line "when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern"—is too elusive to be a standard for constitutional protection. It involves a judgment as to information to which the public is entitled plus a judgment as to offensiveness, and it is so phrased that a finding of

BLEED THROUGH

offensiveness precludes the public from being entitled to the information. This kind of line drawing is not in keeping with the principles stated by this Court in *Winters* (p. 510):

> ". . . . We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature."

It would also transgress the rule that the publisher "cannot be required to guess" (*Winters,* p. 515; *see also Hill,* p. 389; *Metromedia,* p. 50). Indeed, it is difficult to imagine a concept more pernicious to freedom of the press than a rule that the discretion of the editor to publish truthful and factual accounts shall be gauged by after-the-fact determinations of judges and juries as to what facts the public "is entitled" to have and what facts the public should not have because they are "offensive". *Cf. Tornillo,* p. 258. In the words of Dean Prosser, "it is a power of censorship over what the public may be permitted to read" (fn. p. 8, *supra*).

b. The standard adopted below is not really a standard for constitutional protection. Instead it is the outmoded common law test that one may not publish private facts which are "offensive to a person of ordinary sensibilities"*

*Note particularly App. A, fn. 11, p. 14, of the opinion below where the court said that the words "morbid and sensational" were merely "illustrative of the degree of offensiveness which should be present".

which is based on a mistaken reading of tentative drafts of the Restatement (Second) of Torts. Thus the court below took its standard from comment f. of Tentative Draft No. 13 (American Law Institute, 1967) without noting that Tentative Draft No. 21 (1975), on which it also relied, had eliminated any offensiveness test with respect to any matter in which the public had a legitimate concern—*i.e.*, any matter of public interest (see App. A, pp. 13-14, and fn. 10).*

c. Instead of its erroneous standard, the court below should have adopted some alternative more in keeping with the relevant decisions of this Court such as the constitutional standard laid down for privacy actions in the *Hill* case—*i.e.*, that discussion of matters of public interest is protected. Beginning with Warren and Brandeis, through more than 85 years of adjudication and scholarly comment, the limitations on the right of privacy have been discussed in terms of public interest in the publication. Simply stated, there must be a constitutional privilege

*Section 652D of Tentative Draft No. 21 would impose liability for publicizing matter concerning private life which

> "(a) WOULD BE HIGHLY OFFENSIVE TO A REASONABLE PERSON, *and*
>
> "(b) IS NOT OF LEGITIMATE CONCERN TO THE PUBLIC." (Emphasis added.)

As this two-fold test makes clear, if the matter published is of legitimate concern to the public, the question of offensiveness is never reached. The constitutional reason for that result is explained in the preliminary note at pages 86-87 of Tentative Draft No. 21 which states:

> "There has been a question for some time as to whether the Supreme Court will find § 652D (publicity for embarrassing details of private life) to be reconcilable with the First Amendment. . . . The Section has therefore been retained with the utilization of the phrase 'of legitimate concern to the public.'"

The court below erred in concluding that this First Amendment caveat did not effect a substantive change and in its erroneous reliance on the obsolete comment of Tentative Draft No. 13 for its "offensiveness" standard.

BLEED THROUGH

that protects truthful publications rationally relevant to matters of public interest. While *Gertz* made the scope of constitutional protection in defamation dependent upon the status of the plaintiff as a public or private individual, rather than upon public interest, a similar dichotomy seems neither required nor warranted in privacy actions based on a truthful publication. Unlike defamatory falsehood, truth has intrinsic value; in addition, truthful public disclosure privacy actions do not involve damage to reputation. Presumably for reasons like these *Gertz* left open (p. 348) the continued application of *Hill's* public interest test for privacy.

Another alternative in keeping with the decisions of this Court would be an adaptation of the test applied in *Miller* for obscenity as a matter of law—*i.e.*, to distinguish between "commerce in ideas" as against "commercial exploitation of obscene material" (p. 36). That test, which was previously employed for obscenity in *Kois* and subsequently in *Jenkins*, has also been used in the advertising field as *Bigelow* (p. 822) makes clear. There would not appear to be any reason why it should not be adopted for privacy. Under it petitioner's publication was patently "commerce in ideas" entitled to constitutional protection.

d. In addition to failing to follow the foregoing decisions of this Court, the decision below conflicts with the Sixth Circuit's decision in *Cantrell* (484 F. 2d 150, 156-57 (1973)) proposing the following standard:

> "The judgment of what is newsworthy must remain primarily a function of the publisher. . . . Only in cases of flagrant breach of privacy which has not been waived or obvious exploitation of public curiosity where no legitimate public interest exists should a court substitute its judgment for that of the publisher."

This Court in *Cantrell* did not pass on that "editor's discretion" standard since it found that the problem was not involved (p. 250), but the Sixth Circuit's approach has much to recommend it. It meets the caution expressed in *Gertz* regarding the ability of courts to determine public interest as a matter of law. At the same time it protects editorial discretion—which *Tornillo* (p. 258) and *Cox* (p. 496) emphasize is the essence of press freedom—by providing a privilege for truthful publication which is defeasible only when the court concludes as a matter of law that such publication constitutes a clear abuse of the editor's constitutional discretion to publish and discuss subjects and facts which in his judgment are matters of public interest. Just as false and defamatory publications are given protection, not because of any intrinsic value, but because the protection provides "breathing space" for the press, an editor's judgment of public interest for publication of true, nondefamatory material must not be subject to the Monday morning discretion of a judge or jury. That is the vice of the decision below which requires this Court's attention.

2. Application of the proper standard should be a matter of law for the court.

The error made by the court below in devising its standard was compounded by the court's refusal to apply it as a matter of law. Instead of reaching its own determination, the court below remanded for consideration as to whether "reasonable minds could differ", and jury questions would accordingly be raised, on whether the private facts were "matters in which the public has a legitimate interest" and "whether the publicizing of these facts would prove highly offensive to a reasonable person—one of ordinary sensibilities." (App. A, p. 18). In so doing, the court below failed to follow applicable decisions of this

BLEED THROUGH

Court, and its action also conflicts with the decisions in other circuits.

This Court has repeatedly emphasized that it is for the courts to determine the application of constitutional protection lest the press be at the mercy of the passions of juries. In *New York Times* itself this Court reviewed the evidence "to determine whether it could constitutionally support a judgment for respondent" (pp. 284-85).

In *Rosenblatt* determination of "public official" was for the Court in order to "lessen the possibility that a jury will use the cloak of a general verdict to punish unpopular ideas or speakers" (fn. 15, p. 88).* In *Butts* the question of truth was not for a jury, for if it were it would "effectively institute a system of censorship" (p. 152). In *Monitor Patriot*, determination of "relevance" was for the Court, since a jury "is unlikely to be neutral with respect to the content of speech and holds a real danger of becoming an instrument for the suppression of those 'vehement, caustic and sometimes unpleasantly sharp attacks,' *New York Times, supra*, at 270, which must be protected if the guarantees of the First and Fourteenth Amendments are to prevail" (p. 277). In *Pape*, the question of "rational relevance" was for the Court so that the publisher would not be "virtually at the mercy of the unguided discretion

*This same fear that a general verdict would be used to cloak an impermissible determination concerning a constitutional question led this Court to hold in *Jackson* v. *Denno*, 378 U. S. 368, 377, that New York's procedure leaving the determination of voluntariness of a confession to the jury "if the evidence present[ed] a fair question as to its voluntariness", was unconstitutional.

Just as the general verdict in *Jackson* made it "impossible to discover whether the jury found the confession voluntary and relied upon it, or involuntary and supposedly ignored it" (p. 379), so in the First Amendment area it would be impossible to discover whether a jury found that the public did not have a legitimate interest in the facts disclosed or that the public had a legitimate interest but that the defendant should be punished anyway. The judgment was reversed in *New York Times* because it was impossible to know on what basis the general verdict had been returned (p. 284).

of a jury" (p. 291). In *Gertz,* the doctrine of presumed damages was eliminated since it "invites juries to punish unpopular opinion" (p. 349) and the doctrine of punitive damages severely limited since juries "remain free to use their discretion selectively to punish expressions of unpopular views" (p. 350).

It is thus inexplicable why the court below left open the possibility for a jury to find as a matter of fact whether the "public has a legitimate interest" in the facts disclosed or "whether the publicizing of these facts would prove highly offensive to a reasonable person—one of ordinary sensibilities". That ruling cannot be squared with the many decisions of this Court holding that attributes of the content or act of publication as tested against a constitutional standard should be decided by a court as a matter of law. Thus, this Court has ruled as a matter of law regarding attributes of the content or act of publication which did not meet the standard of "actual malice", including falsity, defamatory content, failure to retract and investigatory failure in *New York Times*, ill will and negligence in *Garrison* and *Henry*, public official in *Rosenblatt*, falsity in *Butts*, failure to investigate in *Beckley Newspapers*, defamatory content in *Greenbelt*, rational interpretation in *Pape*, relevance in *Monitor Patriot*, and mistaken identity in *Ocala Star-Banner.*

The decision below—which leaves open for a jury to find whether "the public has a legitimate interest" in the facts disclosed or whether their publication "would prove highly offensive to a reasonable person—one of ordinary sensibilities"—cannot be squared with the foregoing decisions of this Court. It also conflicts with the decisions of other Circuits. In remanding for consideration of a possible jury issue, the court below relied on its prior decisions in *Guam Federation of Teachers* v. *Ysrael*, 492 F. 2d 438 (1974), *cert. denied*, 419 U. S. 872, and *Alioto* v.

BLEED THROUGH

Cowles Communications, Inc., 519 F. 2d 777 (1975), *cert. denied*, U. S. , 96 Sup. Ct. 280, which assert that the manner in which the evidence is to be examined in the light of the constitutional standard is "the same as in all other cases in which it is claimed that a case should not go to the jury". That assertion is contrary to the foregoing decisions of this Court and to the decisions of the District of Columbia Circuit in *Wasserman* v. *Time, Inc.*, 424 F. 2d 920 (1970), *cert. denied*, 398 U. S. 940, and the Fifth Circuit in *Bon Air Hotel, Inc.* v. *Time, Inc.*, 426 F. 2d 858 (1970), which the court below in *Guam* and *Alioto* expressly declined to follow. *Wasserman* and *Bon Air* state that the court is to weigh the evidence, judge the credibility of the witnesses and draw its own inferences in deciding whether, in the light of the constitutional standard, judgment should be given as a matter of law for a publisher or the case submitted to the jury.* The decision below also conflicts with the decision of the Second Circuit in *Sidis* v. *F-R. Pub. Corporation*, 113 F. 2d 806 (1940), *cert. denied*, 311 U. S. 711, which had dismissed a public disclosure of private facts case as a matter of law (even though it did not expressly recognize the constitutional implication).

CONCLUSION

This case squarely presents for decision the last major questions in the constitutional libel-privacy field on facts which are complete and without contradiction. The answers are of nationwide importance and immediacy to every publisher in the country. Dean Prosser, in 1960, pointed out "that it is high time that we realize what we are doing, and give some consideration to the question of where, if any-

*See also the opinion of the district judge in *Pape*, who dismissed the case as a matter of law after assessing the credibility of the Time, Inc. witnesses before him (294 F. Supp. 1087), and whose action in doing so was upheld by this Court.

where, we are to call a halt". We strongly urge that this is the time and the case, particularly since the holding below is inconsistent with decisions of this Court and conflicts with other Circuits.

For the reasons stated, the petition should be granted.

February 18, 1976.

Respectfully submitted,

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APPENDIX A

APPENDIX A

Opinion and order of the United States Court of Appeals for the Ninth Circuit of December 5, 1975

MICHAEL S. VIRGIL, aka MIKE VIRGIL,
Plaintiff-Appellee,
vs.
TIME, INC., a New York corporation,
Defendant-Appellant.

No. 72-2851
OPINION

[December 5, 1975]

On Appeal from the United States District Court for the Southern District of California

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Before: MERRILL and CHOY, Circuit Judges, and EAST,* District Judge.

MERRILL, Circuit Judge:

This suit was brought in California state courts by appellee, Virgil, complaining of a violation of his right of privacy. It was removed to federal court by appellant, Time, Incorporated, on grounds of diversity. This interlocutory appeal, taken pursuant to 28 U. S. C. § 1292(b), is from an order of the district court denying the motion of appellant for a summary judgment.

The facts are stated by the district court in its memorandum decision as follows:

> "The complaint is based upon an article that appeared in the February 22, 1971, issue of *Sports*

*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

Illustrated magazine [owned by appellant], entitled 'The Closest Thing to Being Born.' The article concerned the sport of body surfing as practiced at the 'Wedge,' a public beach near Newport Beach, California, reputed to be the world's most dangerous site for body surfing. The article attempted to describe and explore the character of the unique breed of man who enjoys meeting the extreme hazards of body surfing at the Wedge. Plaintiff is well known as a constant frequenter of the Wedge and is acknowledged by body surfers there to be the more daredevil of them all. He was extensively interviewed by Thomas Curry Kirkpatrick, the author of the article, and much of the information obtained from these interviews was used in the *Sports Illustrated* story. Photographs showing plaintiff surfing and lying on the public beach were taken and used to illustrate the article.

Plaintiff admits that he willingly gave interviews to Kirkpatrick and that he knew that his name and activities as a body surfer might be used in connection with a forthcoming article in *Sports Illustrated*. But plaintiff now alleges that he 'revoked all consent' upon learning that the article was not confined solely to testimonials to his undoubted physical prowess.

The article complained of was written by Kirkpatrick, a *Sports Illustrated* staff writer. In the summer of 1969 he received authorization from the senior editor of the magazine to do a story about the Wedge and the men who surf there. He was supplied with names and information about prominent body surfers, including the plaintiff, by the

BLEED THROUGH

Beverly Hills bureau of Time, Inc. He began researching the article that summer, and contacted many surfers at the Wedge. Through these sources Kirkpatrick heard about the plaintiff and his daredevil attitude toward body surfing and life in general. He returned to the Newport Beach area the following summer to complete his research. It was during this period that Kirkpatrick first met the plaintiff and conducted several interviews with him.

The photographs complained of were taken by a local freelance photographer who was commissioned by the defendants to photograph the Wedge and the body surfers. The photographer arranged, through one of the surfers, to have a group of surfers, including the plaintiff, come to the Wedge to have their pictures taken in connection with the article.

Before publication the Kirkpatrick article was checked and researched by another *Sports Illustrated* staff member. For that purpose the checker telephoned the plaintiff's home and verified some of the information with the plaintiff's wife. The checker also talked to the plaintiff concerning the article, at which point, for the first time, the plaintiff indicated his desire not to be mentioned in the article at all, and that he wanted to stop the story. While not disputing the truth of the article or the accuracy of the statements about him which it contained, and while admitting that he had known that his picture was being taken, the plaintiff indicated that he thought the article was going to be limited to his prominence as a surfer at the Wedge, and that he did not know that it would contain refer-

ences to some rather bizarre incidents in his life that were not directly related to surfing.

In spite of the plaintiff's expressed opposition to the article, the article was published following its approval by the editorial staff and legal counsel for Sports Illustrated. In its published form, the article is eleven pages long and contains approximately 7,000 words. The article refers by name to many people who surf at the Wedge, and concludes in the last two pages with an account of the plaintiff's daredevil feats at the Wedge and a series of anecdotes about him that emphasize the psychological characteristics which presumably explain the reckless disregard for his own safety which his surfing demonstrates.

Along with the photographs of the plaintiff, he complains of these references to incidents in his private, or non-surfing, life."[1]

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[1]E.g.: "He is somewhat of a mystery to most of the regular personnel, partly because he is quiet and withdrawn, usually absent from their get-togethers, and partly because he is considered to be somewhat abnormal."

"Virgil's carefree style at the Wedge appears to have emanated from some escapades in his younger days, such as the time at a party when a young lady approached him and asked where she might find an ashtray. 'Why, my dear, right here,' said Virgil, taking her lighted cigarette and extinguishing it in his mouth. He also won a small bet one time by burning a hole in a dollar bill that was resting on the back of his hand. In the process he also burned two holes in his wrist."

The article quoted a statement Virgil made to the author about a trip to Mammoth Mountain: " 'I quit my job, left home and moved to Mammoth Mountain. At the ski lodge there one night I dove headfirst down a flight of stairs—just because. Because why? Well, there were these chicks all around. I thought it would be groovy. Was I drunk? I think I might have been.' "

The article quotes Virgil as saying: " 'Every summer I'd work construction and dive off billboards to hurt myself or drop loads of

BLEED THROUGH

Appendix A

Respecting the applicable state law, the district court stated:

> "California has adopted Dean Prosser's analysis of the tort of invasion of privacy. *Kapellas* v. *Kofman,* 1 C.3d 20, 35, n.16, 459 P.2d 912, 81 Cal.Rptr. 360 (1969). According to that analysis, four separate torts are included within the broader designation of invasion of privacy.
>
> 1. *Intrusion* upon the plaintiff's seclusion or solitude, or into his private affairs;
>
> 2. Public *disclosure of embarrassing private facts* about the plaintiff;
>
> 3. Publicity which places the plaintiff in a *false light* in the public eye;
>
> 4. *Appropriation,* for the defendant's advantage, of plaintiff's name or likeness.

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lumber on myself to collect unemployment compensation so I could surf at the Wedge. Would I fake injuries? No, I wouldn't fake them. it all the time. I do what feels good. That's the way I live my life. If pretty reckless life. I think I might have been drunk most of the time.' "

Again quoting Virgil, the author relates: " 'I love tuna fish. Eat it all the time. I do what feels good. That's the way I live my life. If it makes me feel good, whether it's against the law or not, I do it. I'm not sure a lot of the things I've done weren't pure lunacy.' Cherilee [plaintiff's wife] says, 'Mike also eats spiders and other insects and things.' "

Virgil was further quoted as saying, " 'I've always been determined to find a sport I could be the best in. I was always aggressive as a kid. You know, competitive, mean. Real mean. I bit off the cheek of a Negro in a six-against-30 gang fight. They had tire irons with them. But that was a long time ago. At the Wedge, there are a lot of individualists.' "

The articles notes: "Perhaps because most of his time was spent engaged in such activity, Virgil never learned how to read."

A photo caption reads: "Mike Virgil, the wild man of the Wedge, thinks it possible his brain is being slowly destroyed."

> Prosser, Law of Torts (4th ed. 1971) 804-14. See also Prosser, *Privacy*, 48 Cal. L. Rev. 383, 389 (1960)."[2]

This district court concluded that of these four separate torts the one alleged by plaintiff was that of public disclosure of embarrassing private facts. We agree.[3]

The most recent definition of this tort and discussion of its elements is that to be found in The American Law Institute Restatement (Second) of Torts (Tentative Draft No. 21, 1975). Section 652D gives a new name to the tort, "Publicity Given to Private Life." The black letter reads:

> "One who gives publicity to a matter concerning the private life of another is subject to liability to the other for unreasonable invasion of his privacy, if the matter publicized is of a kind which

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[2]Since *Kapellas* v. *Kofman*, *supra*, cited by the district court, California has decided *Briscoe* v. *Reader's Digest Association*, 4 Cal.3d 529, 483 P.2d 34, 93 Cal.Rptr. 866 (1971), which deals with and recognizes the same tort as is involved here.

[3]While the district court also determined that the "false light" theory applied, Virgil has expressly abandoned this theory on appeal. In the complaint appellee included other claims that can be regarded as dismissed from the case:

(A.) Intentional infliction of emotional distress. Under California law this is found only in cases of extreme or outrageous conduct, *State Rubbish Collectors Association* v. *Siliznoff*, 38 Cal.2d 330, 240 P.2d 282 (1952). Such conduct, apart from the invasion of privacy by the publication of private facts, is not present here, and the case is thus best treated on the basis of the publication tort only.

(B.) Intrusion into private areas. It is clear that Kirkpatrick did not intrude on appellee's solitude and that all interviews were freely given.

(C.) Libel. Virgil expressly denies that this is a libel action.

(D.) Publication of the photograph. Under California law one who voluntarily adopts a pose in public view waives any right of privacy in so far as that particular pose is concerned, *Gill* v. *Hearst Publishing Co.*, 40 Cal.2d 224, 253 P.2d 441 (1953).

BLEED THROUGH

(a) would be highly offensive to a reasonable person, and

(b) is not of legitimate concern to the public."[4]

With respect to "publicity" comment *b* reads in part:[5]

" 'Publicity,' as it is used in this Section, differs from 'publication,' as that term is used in § 577 in connection with liability for defamation. 'Publication,' in that sense, is a word of art, which includes any communication by the defendant to a third person. 'Publicity,' on the other hand, means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge. The difference is not one of the means of communication, which may be oral, written, or by any other means. It is one of communication which reaches, or is sure to reach the public.

Thus it is not an invasion of the right of privacy, within the rule stated in this Section, to communicate a fact concerning the plaintiff's private life to a

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[4]In so far as the elements of the tort are concerned, the Restatement fairly comports with the requirements established by California law, *see Briscoe* v. *Reader's Digest Association*, 4 Cal.3d 529, 483 P.2d 34, 93 Cal.Rptr. 866 (1971), *Kapellas* v. *Kofman*, 1 Cal.3d 20, 34-39, 459 P.2d 912, 921-24 (1969).

[5]Section 652D is set out in the Restatement (Second) of Torts (Tentative Draft No. 21, 1975) without comment. The comments to § 652D cited in the text are found in Restatement (Second) of Torts (Tentative Draft No. 13, 1967). The changes made to § 652D by Tentative Draft No. 21 do not appear to affect the validity of any of these comments, nor is any indication given in the preliminary note to Tentative Draft No. 21, pp. 86-87, that the previously published comments are no longer applicable.

> single person, or even to a small group of persons. On the other hand, any publication in a newspaper or a magazine, even of small circulation, or in a handbill distributed to a large number of persons, or any broadcast over the radio, or statement made in an address to a large audience, is sufficient to give publicity within the meaning of the term as it is used in this Section. The distinction, in other words, is one between private and public communication."

With respect to "private life," comment *c* reads in part:

> "The rule stated in this Section applies only to publicity given to matters concerning the private, as distinguished from the public, life of the individual. There is no liability when the defendant merely gives further publicity to information about the plaintiff which is already public.* * *
>
> Likewise there is no liability for giving further publicity to what the plaintiff himself leaves open to the public eye."

It is argued that by voluntary disclosure of the facts to Kirkpatrick, knowing that he proposed to write an article including information about appellant, appellant had himself rendered public the facts disclosed. We cannot agree.

It is not the manner in which information has been obtained that determines whether it is public or private. Here it is undisputed that the information was obtained without commission of a tort and in a manner wholly unobjectionable. However, that is not determinative as to this particular tort. The offense with which we are here involved is not the intrusion by means of which information is obtained (see note 3(B), *supra*); it is the publicizing of

BLEED THROUGH

that which is private in character. The question, then, is whether the information disclosed was public rather than private—whether it was generally known and, if not, whether the disclosure by appellant can be said to have been to the public at large.

Talking freely to someone is not in itself, under comment *c*, making public the substance of the talk. There is an obvious and substantial difference between the disclosure of private facts to an individual—a disclosure that is selective and based on a judgment as to whether knowledge by that person would be felt to be objectionable—and the disclosure of the same facts to the public at large. The former, as the Restatement recognizes, does not constitute publicizing or public communication (see comment *b* as quoted *supra*) and accordingly does not destroy the private character of the facts disclosed. See *Timperley v. Chase Collection Service*, 272 Cal.App.2d 697, 700, 77 Cal.Rptr. 782, 784 (Cal.Ct. App. 1969); *Schwartz v. Thiele*, 242 Cal.App.2d 799, 805, 51 Cal.Rptr. 767, 770-71 (Cal.Ct.App. 1966).

Talking freely to a member of the press, knowing the listener to be a member of the press, is not then in itself making public. Such communication can be said to anticipate that what is said will be made public since making public is the function of the press, and accordingly such communication can be construed as a consent to publicize. Thus if publicity results it can be said to have been consented to. However, if consent is withdrawn prior to the act of publicizing, the consequent publicity is without consent.[6]

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[6]*See Restatement* (Second) of Torts § 892A(5) (Tentative Draft No. 18, 1972); *State ex rel. La Follette* v. *Hinkle*, 131 Wash. 86, 229 Pac. 317 (1924); Prosser, *Privacy*, 48 Cal. L. Rev. 383, 420 (1960). There may be cases where requiring that an eleventh-hour change of mind be honored would unfairly burden the publisher and where it could not, for that reason, be regarded as a timely revocation of consent. This is not such a case.

We conclude that the voluntary disclosure to Kirkpatrick did not in itself constitute a making public of the facts disclosed.

Appellant contends that since Virgil has not denied the truth of the statements made in the article, the publication was privileged under the First Amendment. The law has not yet gone so far.

The most recent Supreme Court expression on the subject, *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469, 95 S.Ct. 1029 (1975), dealt with the same tort as is involved here, characterized by the Court as "the right [of one] to be free from unwanted publicity about his private affairs, which, although wholly true, would be offensive to a person of ordinary sensibilities." *Id.* at 489, 95 S.Ct. at 1043. The Court noted:

> "* * * the appellants urge upon us the broad holding that the press may not be made criminally or civilly liable for publishing information that is neither false nor misleading but absolutely accurate, however damaging it may be to the reputation or individual sensibilities."

Id. The Court refused to reach this broad question "whether truthful publications may ever be subjected to civil or criminal liability consistently with the First and Fourteenth Amendments * * *." *Id.* at 491, 95 S.Ct. at 1044. It chose instead to deal with a "narrower interface between press and privacy," *id.*, focusing on the protectable area of privacy and excluding from it material to be found in judicial records open to inspection by the public.

The Supreme Court, then, has not held in accordance with the contentions of appellant. Instead it has expressly declined to reach the issue presented. That issue seems to

BLEED THROUGH

us to be whether, despite California's recognition and the recognition elsewhere given, this tortious violation of privacy is, as a tort, to be written out of the law. It seems to us to contemplate the further question whether the private individual is hereafter to be able to enjoy a private life save with leave of the press; whether (at least so far as the press is concerned) the concept of "private facts" continues to have meaning.[7]

To hold that privilege extends to all true statements would seem to deny the existence of "private" facts, for if facts be facts—that is, if they be true—they would not (at least to the press) be private, and the press would be free to publicize them to the extent it sees fit. The extent to which areas of privacy continue to exist, then, would appear to be based not on rights bestowed by law but on the taste and discretion of the press. We cannot accept this result.

To test the validity of such a rule we might start with the public's right to know under the First Amendment. Does the spirit of the Bill of Rights require that individuals be free to pry into the unnewsworthy private affairs of their fellowmen? In our view it does not. In our view fairly defined areas of privacy must have the protection of law if the quality of life is to continue to be reasonably acceptable.[8]

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[7]In this respect we note that privacy is not only a personal interest, but is also one of concern to society as a whole. *Rosenblatt* v. *Baer*, 383 U. S. 75, 92-94 (1966) (Stewart, J., concurring).

[8]*Afro-American Publishing Co.* v. *Jaffe*, 366 F.2d 649, 654 (D. C. Cir. 1966) (en banc) similarly refused to allow First Amendment values to completely override actions for invasions of privacy: "The right of privacy stands on high ground, cognate to the values and concerns protected by constitutional guarantees. But this must be accommodated to the need for reasonable latitude for the selection of topics for discussion in newspapers. That right of the press, likewise supported by constitutional guarantees, is crucial to the vitality of democracy. The courts are called upon here, as elsewhere in the law, to harmonize individual rights and community interests." (footnote omitted.)

The public's right to know is, then, subject to reasonable limitations so far as concerns the private facts of its individual members.

If the public has no right to know, can it yet be said that the press has a constitutional right to inquire and to inform? In our view it cannot. It is because the public has a right to know that the press has a function to inquire and to inform.[9] The press, then, cannot be said to have any right to give information greater than the extent to which the public is entitled to have information.

Recent decisions of the Supreme Court, we feel, also strengthen our conclusion. These decisions serve to emphasize that First Amendment interests may be circumscribed due to competing values which are also of substantial importance to society. *U. S. Civil Service Commission* v. *Letter Carriers*, 413 U. S. 548 (1973), *Branzburg* v. *Hayes*, 408 U. S. 665 (1972). More particularly, *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974) acknowledged the need to recognize the strength of legitimate state interests in protecting the well-being of its citizens, even in the face of a broad First Amendment challenge. The state's interest in protecting the privacy of its citizens seems to us no less legitimate than the state's interest, upheld in *Gertz*, in protecting its citizens' reputations. Indeed, privacy shares the same underlying purpose invoked by the Court in *Gertz* in upholding the state's interest in the law of libel; for privacy, no less than reputation,

> "'reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system.' *Rosenblatt* v. *Baer*, 383 U. S. 75, 92 (1966) (concurring opinion)," cited in *Gertz* v. *Robert Welch, Inc.*, *supra* at 341.

[9] *See Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U. S. 94, 122 (1973), indicating that the foremost First Amendment concern is the interest of the public; *see also Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 390 (1969).

We conclude that unless it be privileged as newsworthy (a subject we discuss next), the publicizing of private facts is not protected by the First Amendment.

The privilege to publicize newsworthy matters is included in the definition of the tort set out in Restatement (Second) of Torts § 652D (Tentative Draft No. 21, 1975). Liability may be imposed for an invasion of privacy only if "the matter publicized is of a kind which * * * is not of legitimate concern to the public." While the Restatement does not so emphasize, we are satisfied that this provision is one of constitutional dimension delimiting the scope of the tort and that the extent of the privilege thus is controlled by federal rather than state law.

Restatement comment casts light on the nature of matter that "is not of legitimate concern to the public." The privilege extends to "voluntary public figures," comment *c*,[10] and to some "involuntary public figures" (those "who have not sought publicity or consented to it, but through their own conduct or otherwise have * * * become 'news,' ") comment *d*. It extends to "all matters of the kind customarily regarded as 'news,' " comment *e;*

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[10]Comment *c*, as well as the other comments cited or referred to in the text, is taken from the comments to Restatement (Second) of Torts § 652F (Tentative Draft No. 13, 1967). That section, which spoke of the privilege to publicize matters of public interest, has now been eliminated; the provision of § 652F pertinent to the tort involved here has now been directly incorporated within § 652D by Restatement (Second) of Torts (Tentative Draft No. 21 1975). The preliminary note to Tentative Draft No. 21, p. 86, indicates that the purpose of this change was to treat the element of "legitimate concern to the public" as a restriction on the cause of action rather than as a privilege; nothing is said to indicate that a substantive change with respect to any matter in the comments is intended. Accordingly, we shall treat the comments to the now eliminated § 652F as applicable to § 652D as it presently exists.

and also "giving information to the public for purposes of education, amusement or enlightenment, where the public may reasonably be expected to have a legitimate interest in what is published," comment *h*.

That this privilege extends to private facts is made clear by comment *f*. It is emphasized, however, that the privilege is not unlimited. The comment states:

> "In determining what is a matter of legitimate public interest, account must be taken of the customs and conventions of the community; and in the last analysis what is proper becomes a matter of the community mores. The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern. * * *"

In our judgment such a standard for newsworthiness does not offend the First Amendment; by the extreme limits it imposes in defining the tort[11] it avoids unduly limiting the breathing space needed by the press for the exercise of effective editorial judgment. *See Miami Herald Publishing Co.* v. *Tornillo,* 418 U. S. 241 (1974). The definition of the "line to be drawn" is not as clear as one would wish, but it expresses the distinction between that which is of legitimate public interest and that which is

[11]We do not intend that "morbid and sensational" be taken too literally. This language is not, in our view, to be regarded as a statement of a prerequisite but rather as illustrative of the degree of offensiveness which should be present.

not as well as we could do[12] Where competing values are involved (see note 8), unless one competitor is to be sacrificed outright, those involved with the competition must accept that risks are inherent and the problem lies in attempting to minimize them to the extent that the conflict permits. In our view this the Restatement has done. Accordingly we accept the Restatement's standard for newsworthiness.

We move, then, to the question whether, with such a standard to be applied, the district court correctly ruled that factual issues remained to be resolved on trial. Here appellant makes a vigorous attack upon the order appealed from. Appellant contends: "A press which must depend upon a governmental determination as to what facts are of 'public interest' in order to avoid liability for their truthful publication is not free at all. * * * [However,] protection of the editor's discretion need not result in a rule which abdicates all responsibility to the press. A constitutional rule can be fashioned which protects all the interests involved. This goal is achieved by providing a privilege for truthful publications which is defeasible only when the court concludes as a matter of law that the truthful publication complained of constitutes a clear abuse of the editor's constitutional discretion to publish and discuss subjects and facts which in his judgment are matters of public interest."

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[12]The fact that the standard is made to depend on community mores does not, to us, make it constitutionally infirm. Community standards play a role of constitutional dimension in other areas of free speech--*e.g.*, as to the obscene nature of a publication, *Miller* v. *California*, 413 U. S. 15, 24 (1973). While determinations regarding community standards are subject to close judicial scrutiny, *Jenkins* v. *Georgia*, 418 U. S. 153, 160-61 (1974), they nonetheless are essential in the resolution of free speech questions which are predicated on community values.

We cannot agree that the First Amendment requires that the question must be confined to one of law to be decided by the judge. Courts have not yet gone so far in other areas of the law involving First Amendment problems, such as libel and obscenity. The testing of facts against a standard founded on community mores does entail judgment of the court itself. But if there is room for differing views as to the state of community mores or the manner in which it would operate upon the facts in question, there is room for the jury function. The function of the court is to ascertain whether a jury question is presented.[13]

This court, in *Guam Federation of Teachers, Local 1581, A. F. T.* v. *Ysrael*, 492 F. 2d 438, 441 (9th Cir. 1974), *cert. denied* 419 U. S. 872 (1974), stated:

> "We agree * * * that it is important that judges focus attention on the summary judgment, directed verdict and judgment notwithstanding the verdict procedures in libel actions. When civil cases may have a chilling effect on First Amendment rights, special care is appropriate. Thus, a judicial examination at these stages of the proceeding, closely scrutinizing the evidence to determine whether the

[13]The determination whether a matter is of public interest thus differs from the determination whether an individual is a public official or figure, which at least in the first instance is a matter for the trial judge. *Rosenblatt* v. *Baer*, 383 U. S. 75, 88 (1966). The rationale advanced for this latter approach is to lessen the possibility that jury will use the general verdict as a cloak to punish unpopular ideas or speakers, *id.* at 88 n. 15, *Monitor Patriot Co.* v. *Roy*, 401 U. S. 265, 276-77 (1971). While this danger is also present in the area of privacy, we believe that a determination founded on community mores must be largely resolved by a jury subject to close judicial scrutiny to ensure that the jury resolutions comport with First Amendment principles, *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 285 (1964).

> case should be terminated in a defendant's favor, provides a buffer against possible First Amendment interferences. The Supreme Court has instructed trial courts to 'examine for [themselves] the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect.' * * *
>
> * * *
>
> The *standard* against which the evidence must be examined is that of *New York Times* and its progeny. But the *manner* in which the evidence is to be examined in the light of that standard is the same as in all other cases in which it is claimed that a case should not go to the jury. If the evidence, so considered, measures up to the *New York Times* standard, the case is one for the jury, and it is error to grant a directed verdict, as the trial judge did in this case."

See also: Alioto v. *Cowles Communications, Inc.*, 519 F. 2d 777 (9th Cir. 1975), *cert. denied* ..... U. S. ..... (1975).

The final question, then, is whether in application of the standard for newsworthiness taken from the Restatement, jury questions are presented.

We may concede, arguendo, that the privilege to publicize newsworthy matter would, as matter of law, extend to the general subject of the article here in question: body surfing at the Wedge. While not hot news of the day, this subject quite properly can be regarded as of general public interest.

However, accepting that it is, as matter of law, in the public interest to know about some area of activity, it does

not necessarily follow that it is in the public interest to know private facts about the persons who engage in that activity. The fact that they engage in an activity in which the public can be said to have a general interest does not render every aspect of their lives subject to public disclosure. Most persons are connected with some activity, vocational or avocational, as to which the public can be said as matter of law to have a legitimate interest or curiosity. To hold as matter of law that private facts as to such persons are also within the area of legitimate public interest could indirectly expose everyone's private life to public view. Limitations, then, remain to be imposed and at this point factual questions are presented respecting the state of community mores.

Among the questions so presented here are: Whether (and, if so, to what extent), private facts respecting Virgil, as a prominent member of the group engaging in body surfing at the Wedge, are matters in which the public has a legitimate interest; whether the identity of Virgil as the one to whom such facts apply is matter in which the public has a legitimate interest.[14] (Additional questions, related not to privilege but to other elements of the tort are: whether, for reasons other than the voluntary and knowing communication to Kirkpatrick, the facts had become matter of public knowledge; if not, whether the publicizing of these facts would prove highly offensive to a reasonable person—one of ordinary sensibilities.)

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[14]It should be noted that while the California Supreme Court has held that the public may have a legitimate interest in the retelling, years after the event, of the story of a crime and the successful prosecution of the criminal, it refused to include within the privileged area as matter of law the identity of the criminal who had successfully rehabilitated himself in the meantime. *Briscoe* v. *Reader's Digest Association*, 4 Cal.3d at 541-42, 483 P.2d at 43.

On these questions the function of the court on motion for summary judgment is to decide whether, on the record, reasonable minds could differ. If in the judgment of the court reasonable minds could not differ, and the answer on which reasonable minds agree favors invocation of the privilege, then summary judgment for the appellant would be proper.

We have no way of knowing whether, in denying summary judgment, the court had in mind matters we have here discussed. *Guam Federation of Teachers, supra,* had not then been decided and the court did not have before it the language of that case stressing the importance of close judicial scrutiny of the evidence as a buffer against possible First Amendment interferences. We think, on balance, the desirable remand would be one that invites reconsideration of the motion in the light of our views here expressed.[15]

The order denying summary judgment is vacated and the case is remanded for reconsideration of the motion in the light of the views here expressed.

No costs are allowed to either party.

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[15]However, we have no desire to crowd the district court into making judgment at this stage of the case should it regard the record as inadequate. The case is before us in an unusual context. Denial (as distinguished from grant) of summary judgment involves not only pure questions of law; it involves as well an exercise of discretion upon the question whether decision should be postponed until it can be founded on a more complete factual record.

APPENDIX B

APPENDIX B

Judgment of the United States Court of Appeals for the Ninth Circuit of December 5, 1975

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

U. S. Court of Appeals and Post Office Building
7th & Mission Streets, P. O. Box 547
San Francisco, California 94101

Dec. 5, 1975

72-2851 Michael S. Virgil vs. Time, Inc.

Dear Sir:

An opinion in the above case was filed today, and pursuant to Rule 36 of the Federal Rules of Appellate Procedure a judgment was entered Dec. 5, 1975, vacating and remanding the judgment or order of the court below (or administrative agency).

Pursuant to Rule 41(a) the mandate of this court will issue 21 days after the entry of judgment, unless the court enters an order otherwise, or grants a stay of the mandate or a petition for rehearing is filed. If a petition for rehearing is filed and denied, the mandate shall issue 7 days after the entry of the order denying the petition.

Very truly yours,

Clerk
U. S. Court of Appeals

APPENDIX C

APPENDIX C

Opinion and order of the United States District Court for the Southern District of California of August 18, 1972

United States District Court, Southern District of California.

Michael S. Virgil, aka Mike Virgil, Plaintiff, v. Sports Illustrated; and Time, Inc., a New York corporation, Defendants. Civil No. 71-179-GT.

The defendant Time, Inc., the publisher of defendant *Sports Illustrated,* has moved for summary judgment under Rule 56, F. R. C. P., in this diversity action. The complaint alleges a cause of action for invasion of privacy and defamation, and a cause of action based on the intentional infliction of emotional distress. The sole basis for the defendants' motion is that the pleadings and affidavits before the Court show that there is no genuine issue as to any material fact and that, under the First Amendment privilege as first applied in *New York Times* v. *Sullivan,* 376 U. S. 254 (1964), the defendant is entitled to judgment as a matter of law.

The complaint is based upon an article that appeared in the February 22, 1971, issue of *Sports Illustrated* magazine, entitled "The Closest Thing to Being Born." The article concerned the sport of body surfing as practiced at the "Wedge," a public beach near Newport Beach, California, reputed to be the world's most dangerous site for body surfing. The article attempted to describe and explore the character of the unique breed of man who enjoys meeting the extreme hazards of body surfing at the Wedge. Plaintiff is well known as a constant frequenter of the Wedge and is acknowledged by body surfers there to be the most daredevil of them all. He was extensively interviewed by Thomas Curry Kirkpatrick, the author of the

article, and much of the information obtained from these interviews was used in the *Sport Illustrated* story. Photographs showing plaintiff surfing and lying on the public beach were taken and used to illustrate the article.

Plaintiff admits that he willingly gave interviews to Kirkpatrick and that he knew that his name and activities as a body surfer might be used in connection with a forthcoming article in *Sports Illustrated*. But plaintiff now alleges that he "revoked all consent" upon learning that the article was not confined solely to testimonials to his undoubted physical prowess.

The article complained of was written by Kirkpatrick, a *Sports Illustrated* staff writer. In the summer of 1969 he received authorization from the senior editor of the magazine to do a story about the Wedge and the men who surf there. He was supplied with names and information about prominent body surfers, including the plaintiff, by the Beverly Hills bureau of Time, Inc. He began researching the article that summer, and contacted many surfers at the Wedge. Through these sources Kirkpatrick heard about the plaintiff and his daredevil attitude toward body surfing and life in general. He returned to the Newport Beach area the following summer to complete his research. It was during this period that Kirkpatrick first met the plaintiff and conducted several interviews with him.

The photographs complained of were taken by a local freelance photographer who was commissioned by the defendants to photograph the Wedge and the body surfers. The photographer arranged, through one of the surfers, to have a group of surfers, including the plaintiff, come to the Wedge to have their pictures taken in connection with the article.

Appendix C

Before publication the Kirkpatrick article was checked and researched by another *Sports Illustrated* staff member. For that purpose the checker telephoned the plaintiff's home and verified some of the information with the plaintiff's wife. The checker also talked to the plaintiff concerning the article, at which point, for the first time, the plaintiff indicated his desire not to be mentioned in the article at all, and that he wanted to stop the story. While not disputing the truth of the article or the accuracy of the statements about him which it contained, and while admitting that he had known that his picture was being taken, the plaintiff indicated that he thought the article was going to be limited to his prominence as a surfer at the Wedge, and that he did not know that it would contain references to some rather bizarre incidents in his life that were not directly related to surfing.

In spite of the plaintiff's expressed opposition to the article, the article was published following its approval by the editorial staff and legal counsel for *Sports Illustrated*. In its published form, the article is eleven pages long and contains approximately 7,000 words. The article refers by name to many people who surf at the Wedge, and concludes in the last two pages with an account of the plaintiff's daredevil feats at the Wedge and a series of anecdotes about him that emphasize the psychological characteristics which presumably explain the reckless disregard for his own safety which his surfing demonstrates.

Along with the photographs of the plaintiff, he complains of these references to incidents in his private, or non-surfing, life. These passages stemmed from interviews with acquaintances of plaintiff and with the plaintiff himself. The first of these involves a quotation from an acquaintance which begins with the characterization of plain-

tiff as follows: " 'Virgil is out there to take on the biggest wave he can find,' says Egan. 'He doesn't care where it is or if he can ride it or not. It might break at Brutal. It might break over the jetty. No matter. Sometimes he rides, but most of the time he just free-falls. That's his thing. He's amazing. He's a wild man. No, he's an animal.' "

Another passage continues: "Virgil's carefree style at the Wedge appears to have emanated from some escapades in his younger days, such as the time at a party when a young lady approached him and asked where she might find an ashtray. 'Why, my dear, right here,' said Virgil, taking her lighted cigarette and extinguishing it in his mouth. He also won a small bet one time by burning a hole in a dollar bill that was resting on the back of his hand. In the process he also burned two holes in his wrist."

The article quoted a statement plaintiff made to the author about a trip to Mammoth Mountain: " 'I quit my job, left home and moved to Mammoth Mountain. At the ski lodge there one night I dove headfirst down a flight of stairs—just because. Because why? Well, there were these chicks all around. I thought it would be groovy. Was I drunk? I think I might have been.' "

The article quotes plaintiff as saying: " 'Every summer I'd work construction and dive off billboards to hurt myself or drop loads of lumber on myself to collect unemployment compensation so I could surf at the Wedge. Would I fake injuries? No, I wouldn't fake them. I'd be damn injured. But I would recover. I guess I used to live a pretty reckless life. I think I might have been drunk most of the time.' "

Again quoting plaintiff, the author relates: " 'I love tuna fish. Eat it all the time, I do what feels good. That's the way I live my life. If it makes me feel good, whether it's against the law or not, I do it. I'm not sure a lot of the

BLEED THROUGH

things I've done weren't pure lunacy.' Cherilee (plaintiff's wife) says, 'Mike also eats spiders and other insects and things.' "

Author Kirkpatrick continues: "About the Wedge, Virgil says, 'I've always been determined to find a sport I could be the best in. I was always aggressive as a kid. You know, competitive, mean. Real mean. I bit off the cheek of a Negro in a six-against-30 gang fight. They had tire irons with them. But that was a long time ago. At the Wedge, there are a lot of individualists.' "

Before proceeding to a discussion of the issues raised by the defendants' motion for summary judgment, the Court must first address itself to an issue which was raised at the hearing by oral argument. The defense has pointed out some ambiguities in the plaintiff's pleadings which have caused some uncertainty as to which theory of invasion of privacy the plaintiff is pursuing. The defendants have concluded from the complaint that the plaintiff has alleged a "false light" theory, while the plaintiff's opposition to the motion for summary judgment proceeds on the basis of an "embarrassing private facts" theory.

California has adopted Dean Prosser's analysis of the tort of invasion of privacy. *Kapellas* v. *Kofman,* 1 C. 3d 20, 35, n.16, 459 P. 2d 912, 81 Cal. Rptr. 360 (1969). According to that analysis, four separate torts are included within the broader designation of invasion of privacy.

1. *Intrusion* upon the plaintiff's seclusion or solitude, or into his private affairs;

2. Public *disclosure of embarrassing private facts* about the plaintiff;

3. Publicity which places the plaintiff in a *false light* in the public eye;

4. *Appropriation,* for the defendant's advantage, of plaintiff's name or likeness. Prosser, Law of Torts (4th ed. 1971) 804-14. See also Prosser, *Privacy,* 48 Cal. L. Rev. 383, 389 (1960).

It is important to recognize that these four torts are distinct, and have separate elements, a fact that is not always clear in the reported cases. For instance, the intrusion and disclosure theories require the invasion of something secret, secluded, or private, while the false light and appropriation theories do not. The disclosure and false light theories depend upon publicity, while the intrustion and appropriation theories do not (although publicity usually accompanies appropriation). The false light theory requires falsity or fiction, while the others do not. Prosser, Law of Torts 814-15 (4th ed. 1971).

Paragraph X of the first cause of action of plaintiff's complaint reads as follows:

> The publication of said article entitled
>
> > "The Closest Thing to Being Born", together with the article pertaining to plaintiff and the unauthorized use of the picture of plaintiff and an unknown female, has subjected plaintiff to scorn, ridicule, derision, humiliation and embarrassment, and has cast him in a defamatory and false light in the eyes of the public at large, and has been an unwarranted invasion of his privacy.

This certainly supports the defendant's argument that the plaintiff has alleged a false light claim.

But paragraphs VII, VIII and IX contain allegations more consistent with an embarrassing private facts theory than with a false light cause of action. The complaint contains allegations to the effect that the plaintiff was led to

BLEED THROUGH

believe that his name would be used in connection with his ability as an outstanding body surfer, and for that limited purpose he consented to his name appearing in the article. It is alleged that plaintiff was unaware that the article would emphasize his personality characteristics and traits as opposed to his ability as a body surfer. The complaint further alleges that the plaintiff never consented to the publication of any facts "pertaining to his personal life or personal characteristics. . . ." It is inferable from the above that the plaintiff made certain disclosures to the author under the erroneous impression that they would not be included in the article because they had nothing to do with the plaintiff's conception of the subject matter of the article. This, in fact, is the position that the plaintiff took in his opposition to the motion for summary judgment.[1] Under these circumstances, the Court is of the opinion that it would be appropriate to consider the defendants' motion with respect to both the false light theory and the embarrassing private facts theory.

As indicated above, the defendants have invoked the protection of the First Amendment as applied and interpreted since the 1964 decision in *New York Times* v. *Sullivan, supra*. Specifically, they argue that proof of the editorial process employed by Time, Inc. entitles it to judgment as a matter of law since that process conclusively prevents publication of any statement as to which there is the slightest doubt concerning truth. The defendants have submitted an "editorial reference file" in support of their contention that the plaintiff will be unable to prove "with convincing clarity" that the defendants acted with "actual

[1]It is possible to interpret those allegations as stating a cause of action based on the intrusion theory as well, but since neither party has made that claim, the Court will not speculate further.

malice." The defendants also ask the Court to determine, as a matter of law, that the contents of the article in question involve a matter of "public interest."

Before the Court can reach the question of actual malice, however, it must first be decided whether the defendants are correct when they state that the subject matter of the article is within the public interest. To be more precise, the Court must decide whether it can say as a matter of law that all of the references to the plaintiff were newsworthy or a matter of public interest.

Plaintiff does not dispute the accuracy of the incidents attributed to him in the article. But he argues that these references contain intimate details of his private life having nothing to do with the sport of body surfing. Assuming that the sport of body surfing, or more specifically, body surfing at the Wedge, is a matter of public interest, the plaintiff argues that the intimate details of his private life are not within the scope of the public interest or newsworthiness privilege, or at least that the Court cannot decide that issue as a matter of law.

Applying California law to this question as we must in this diversity action the Court is convinced that the plaintiff is correct. California has adopted a three-point test for determining "newsworthiness."

> In determining whether a particular incident is "newsworthy" and thus whether the privilege shields its truthful publication from liability, the courts consider a variety of factors, including the social value of the facts published, the depth of the article's intrusion into ostensibly private affairs, and the extent to which the party voluntarily acceded to a position of public notoriety. (See *Gill* v. *Curtiss*

> *Publishing Co.* (1952) 38 Cal. 2d 273, 278-279 (239 P. 2d 630.) If the information reported has previously become part of the "public domain" or the intrusion into an individual's private life is only slight, publication will be privileged even though the social utility of the publication may be minimal. (Citations omitted.) On the other hand, when the legitimate public interest in the published information is substantial, a much greater intrusion into an individual's private life will be sanctioned, especially if the individual willingly entered into the public sphere.

Kapellas v. *Kofman,* 1 C. 3d 20, 36, 459 P. 2d 912, 81 Cal. Rptr. 360 (1969). See also *Briscoe* v. *Reader's Digest Assoc., Inc.,* 4 C. 3d 529, 541, 483 P. 2d 34, 93 Cal. Rptr. 866 (1971).

Applying this test to the case at hand, the Court is unable to conclude as a matter of law that the publication of these incidents concerning the plaintiff's private life was within the scope of the definition of "newsworthy." This test appears to be grounded in concepts of reasonableness, a matter calling for the considered judgment of a jury after having heard and examined all of the underlying facts. A jury could reasonably conclude that (1) the publication of the facts about the plaintiff's past behavior is of slight social value, if any; (2) that the depth of the article's intrusion into plaintiff's past behavior was considerable; and (3) that the plaintiff's voluntary accession to a position of notoriety on a local level through his activities as a body surfer did not warrant the exposure of his entire life, past, and present, to a national audience.

Appendix C

The newsworthiness privilege is based upon the public's right to know, a concept that is guaranteed by the First Amendment. *New York Times* v. *Sullivan*, 376 U. S. 254 (1964); *Time, Inc.* v. *Hill*, 385 U. S. 374 (1967); *Rosenbloom* v. *Metromedia*, 403 U. S. 29 (1971). But the fact that an individual is involved in a matter of public interest does not mean that his entire life is open to public inspection. In order to be protected, the facts that are published must have a reasonable relationship to an individual's participation in the activity which is a matter of public interest and which has brought the individual to public attention.

Dean Prosser has pointed out that the recent cases expanding the Constitutional privilege have not cleared up the uncertainty that exists as to the scope of the privilege. In measuring the extent to which the privilege extends to the private life and character of an individual otherwise involved in a matter of public interest, Prosser notes that some rough proportion must be struck between the importance of the public figure and of the occasion for the public interest in him, and the nature of the private facts revealed. Prosser, Law of Torts, 829-30 (4th ed. 1971).

In the case now before the Court, the plaintiff has apparently acquired a reputation in a local community due to his participation in a matter of public interest—body surfing at the Wedge. To what extent that activity and reputation has subjected plaintiff to public examination as to past incidents of his private life is not a matter that can or should be decided upon a motion for summary judgment. That was the decision reached by the California Supreme Court in the *Briscoe* decision, a case which also involved an "embarrassing private facts" theory, and that is the proper decision in this case.

BLEED THROUGH

Appendix C

In some cases it might be possible for a Court to review a publication and the pleadings and to conclude as a matter of law that the subject matter of an article, including references to a particular individual, was a matter of public interest (reports of criminal activity, politics, candidates for public office, etc.). But this plaintiff does not fit within any of these categories; he is at most an amateur athlete of local renown. Neither the pleadings nor affidavits establish that these references are newsworthy, and the Court is unwilling to assume otherwise.

In its motion for summary judgment, the defendant asserts that its publication/editorial process shows as a matter of law that it did not act maliciously in the publication of this article, and has cited numerous Supreme Court decisions from *New York Times* v. *Sullivan, supra,* to *Rosenbloom* v. *Metromedia, supra,* in support of its position. But the malice test applies only where the subject matter of the article has been found to be newsworthy or a matter of public interest. In the case now before the Court, there is a genuine issue of fact as to that crucial issue. If the references to plaintiff's private life are found to be unrelated to the subject matter of the article which is newsworthy, then those references are beyond the scope of the privilege. If the newsworthiness privilege does not apply, then the lack of malice is no defense.

Having concluded that the defendants are not entitled to judgment as a matter of law, the motion for summary judgment is DENIED.

The plaintiff shall amend his complaint within 20 days to clarify the nature of the invasion of privacy theory or

theories that he intends to pursue.

IT IS SO ORDERED.

DATED: August 18, 1972.

/s/ Gordon Thompson, Jr.
GORDON THOMPSON, JR., Judge
United States District Court

Copies to:

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APPENDIX D

APPENDIX D

Pages 71-72 of Sports Illustrated Article of February 22, 1971, titled "The Closest Thing to Being Born"

Only one area in all of body surfing has a more savage appearance than the Wedge, and that is its appendage 250 yards to the west. There, a huge curling wall of surf ("It's so big you could drive a truck through it," says one Wedge man) that smashes straight down into ankle-deep water is known, for obvious reasons, simply as Brutal. This mass of breakers, normally devoid of shape, is spoken of with reverence, almost as if Brutal were some terrible creature that awaits careless surfers and then systematically destroys them. Wedge men generally avoid Brutal, for it affords no escape route, such as diving underwater. As Kevin Egan says, "If you want to swallow a lot of water and sand and destroy your body, Brutal is ideal."

Whatever awe the Wedge men may have left over from a couple of barbarous days at Brutal is reserved for, and directed at, one of their own—a short, long-haired 28-year-old named Mike Virgil. Due to past reputation and recent modus vivendi, Virgil, by design or not, has stamped himself as the archetype of the Wedge, or, rather, as the kind of man our society has always wanted the archetype of the Wedge to be. He is somewhat of a mystery to most of the regular personnel, partly because he is quiet and withdrawn, usually absent from their get-togethers, and partly because he is considered to be somewhat abnormal. Virgil endures as a source of wonderment to his fellows because of the unique way in which he rides the Wedge—a flat-out, straight-down free fall, sometimes sideways, sometimes backwards, sometimes even over Brutal, most of the time looking for all the world like what he wants to do more than anything else is hit the bottom in such a way that he will snap his neck in half.

"Virgil is out there to take on the biggest wave he can find," says Egan. "He doesn't care where it is or if he can ride it or not. It might break at Brutal. It might break over the jetty. No matter. Sometimes he rides, but most of the time he just free-falls. That's his thing. He's amazing. He's a wild man. No, he's an animal."

Virgil will show up at the Wedge only on days of gargantuan waves. Anything less than 10 feet does not interest him. On these occasions he will sit on top of the berm alongside his pretty wife Cherilee, staring out at the Wedge but saying nothing. The other Wedge men watch him carefully to be sure not to miss any portion of the performance. "I didn't know they did that," says Virgil. "That's pretty neat. That's respect. I guess I do ride the biggest waves." When he has, as he says, "timed" the waves and is ready to go, he will rise as if by divine guidance and enter the water. Swimming out through the crashing surf, Virgil will pass up waves that might cause night moaning in lesser men and wait for what he thinks will be the biggest peak. Then he will proceed to catch his wave and start the "ride," first gliding through the water, then turning, kicking into a swim and falling on his side or his back, down, down, down, finally disappearing into the foam, where some spectators believe he will stay forever. Mike Virgil, however, always comes back up. "I may look like I'm being wiped out," he says, "but I'm not. I have a green room that I duck into where there's no turbulence. Only calm. I can reach out of the disaster and touch the calm. It's so damn great I can't even believe it."

Virgil grew up in Pasadena as a legend in the field of high school fisticuffs. He played football as a linebacker, maintaining an image, Nick Hudson says, "as the baddest guy around." Hudson says Virgil was "the baddest" both

on and off the gridiron and "used to cold-cock guys and lay them out instantly." Perhaps because most of his time was spent engaged in such activity, Virgil never learned how to read.

When he was 16 he moved to the beach and became fascinated by the Wedge, seeing in it a chance to develop fully the body-surfing skills he had learned elsewhere. On his first ride at the Wedge, Virgil took off backward in an over-the-falls move, a stratagem that was to endear him forever to veteran Wedge riders since they believed it to be the product of mental derangement. As he hurtled over the top, a backwash wave thundered from the shore, swept him around and upside down, turned him over a second time and slammed him feetfirst into the sand. If he had gone down headfirst, Virgil says now, he would have been killed. As it was, the top half of his leg pointed south, the bottom half pointed west, his knee was "destroyed" and he was in a cast for three months. "I figured then the Wedge was a virility deal," he says. "At least it got me out of the Army. I had to keep going back."

From that point on Virgil was considered Mr. Wipeout. Six years ago he broke his collerbone when a wave did thrust him head first into the sand. Two years later in one of his perfectly demented straight-off numbers, he smashed head on into a goon and/or turkey who was coming the other way. The goon's jaw was caved in and broken in four places, while Virgil needed nine stitches to close the wound over his right eye.

"I don't usually get mad," says Virgil of the latter incident. "I mean, people see me up there and they usually get out of the way. People don't swim under me. I don't get uptight about others in the water. I don't call them turkeys or goons. I call them people. They're just out there

doing their thing, like I am. Anybody who is out there at the Wedge has plenty of hair, let me tell you. I never head-hop, either. That's kid stuff. But this time I was hot. I came out of the water prepared to duke this guy. I might have killed him, but he was hurt bad enough already.

"I don't think I do anything unusual at the Wedge. I don't free-fall all that much. I ride. It's not a philosophy. It's just my deal. I'm not erratic like they say, either, although sometimes I think my brain is slowly being destroyed. You ask a lot of questions, don't you? You get me uptight, you know it? I feel like I'm taking the third degree from a cop. I was a freaked-out kid when I was younger, but that's all in the past. I'm just trying to grow up and be a human being."

Virgil's carefree style at the Wedge appears to have emanated from some escapades in his younger days, such as the time at a party when a young lady approached him and asked where she might find an ashtray. "Why, my dear, right here," said Virgil, taking her lighted cigarette and extinguishing it in his mouth. He also won a small bet one time by burning a hole in a dollar bill that was resting on the back of his hand. In the process he also burned two holes in his wrist.

"I couldn't read anything at all for a long time," Virgil admits. "Cherilee has taught me since then, and now I can read like a 10th-grader. Still, last year I was studying for an English exam at Orange Coast College when I suddenly figured out that it wouldn't do any good to learn the answers if I couldn't read the questions.

"The first time I went skiing my friends had to kidnap me and tell me they were 'taking me to the river.' I went to sleep in the back of a VW bus and woke up at the top of a mountain. I hated snow. They said, 'There it is. Do it.' I

BLEED THROUGH

went down the mountain on my side, on my back, on my front, completely wiped out, destroyed. I absolutely tore up my knees. Ruined them. I loved it. I quit my job, left home and moved to Mammoth Mountain. At the ski lodge there one night I dove headfirst down a flight of stairs—just because. Because why? Well, there were these chicks all around. I thought it would be groovy. Was I drunk? I think I might have been."

"You know you just wanted to impress those chicks," said Cherilee.

"What?" said Virgil. "What? Impress what? These were radical chicks. What's so hard? I used to dive downstairs all the time as a little kid. Also later.

"Every summer I'd work construction and dive off billboards to hurt myself or drop loads of lumber on myself to collect unemployment compensation so I could surf at the Wedge. Would I fake injuries? No, I wouldn't fake them. I'd be damn injured. But I would recover. I guess I used to live a pretty reckless life. I think I might have been drunk most of the time. I fought a bull in Mexico and got knocked down, destroyed. I signed on with a rodeo and rode a Brahma bull for six seconds. I loved it. I worked on a tuna boat and got down in the nets to throw out the sharks that we had collected with the tuna. No, the sharks didn't bite me. They were unconscious. I love tuna fish. Eat it all the time. I do what feels good. That's the way I live my life. If it makes me feel good, whether it's against the law or not, I do it. I'm not sure a lot of the things I've done weren't pure lunacy."

Cherilee says, "Mike also eats spiders and other insects and things."

Virgil says, "Neither of us eats meat. It takes up too much energy. Besides, it isn't good for you."

Appendix D

About the Wedge, Virgil says, "I've always been determined to find a sport I could be the best in. I was always aggressive as a kid. You know, competitive, mean. Real mean. I bit off the cheek of a Negro in a six-against-30 gang fight. They had tire irons with them. But that was a long time ago. At the Wedge, there are a lot of individualists. Guys who do one thing better than anyone else. I take the biggest waves. I started out by being way up there at the top. I could see over the jetty and watch the boats in the harbor and the people on the beach. Then I'd go down. Way down. Fast. Was it bitchin'? I don't say 'bitchin'.' That's juvenile, a teen-age word. I don't say any of that high school stuff. I say 'groovy.' It was groovy. The sidewave guys think free falling is just a hoax. But it's a ride for me. I'm riding and doing spinners and everything. Once I got socked to the bottom and lost my false teeth. The whole beach was looking for them. Now I take my teeth out before I go in the water.

"I have dreams about the Wedge. It takes me places and I'm flying, flying. I'm relaxed and drifting. All my nerves and tensions leave me. I can't go away from the Wedge and miss big sets without getting all upset and worried. There hasn't been much surf lately, and Cherilee and I are going away for 10 days. I'm worried about that. The Wedge means that much to me.

"I dream sometimes I'll die at the Wedge. It's not a death wish or anything like Evel Knievel has. I think Knievel is a smart guy, definitely not crazy. He's a good motorcycle jumper. I think I'd like to jump cycles someday. Evel has a friend who's even more way out than him. His friend has a stunt where he is going to dive-bomb a plane, an old World War II plane, and aim it straight down to the

ground. On the way down this guy is going to jump out—without a parachute now—and then a little later try to sky-dive *back into the plane.* I don't think I'd want to try that. It's groovy, all right, but the theory doesn't seem right."

Virgil was asked why the theory didn't seem right.

"Well, he could get back in," he said. "He could get back in, that's for sure."

But what's the difference? he was asked. He crashes and he dies.

"That's right," said Mike Virgil. "That's right."

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1975

No. 75-1174

TERIE, INC.,
Petitioner,

vs.

MICHAEL S. VIRGIL,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Subject Index

I — Page

Preliminary statement 1

II

The nature of the present case 2

III

The scope of the invasion of privacy in the present case ... 6

IV

Argument in opposition to petition for certiorari 8

A. The standards for defining the tort of invasion of privacy as articulated by the court below—as well as the rulings of the California Supreme Court—are consistent with this court's prior rulings in analogous First Amendment cases 8

B. The courts below properly recognized that the standard for invasion of privacy liability should, where there are genuine issues of fact, be applied in the first instance by the jury 16

V

Conclusion 23

Table of Authorities Cited

Cases	Pages
Afro-American Publishing Co. v. Jaffe, 366 F.2d 649 (D.C. Cir. 1966)	22
Bon-Air Hotel, Inc. v. Time, Inc., 426 F.2d 858 (5th Cir. 1970)	22
Briscoe v. Readers Digest Association, Inc., 4 Cal.3d 529, 483 P.2d 34 (1971)	3, 4, 12, 13, 14, 15, 17, 19
California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972)	5
Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)	5
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 95 S.Ct. 1029	2, 9, 11, 12, 14, 17
Craig v. Harney, 331 U.S. 367 (1947)	16
Curtis v. Loether, 415 U.S. 189 (1974)	20, 21
Dietman v. Time, Inc., 449 F.2d 245 (9th Cir. 1971)	3
Edwards v. So. Carolina, 372 U.S. 229 (1963)	16
Feiner v. New York, 340 U.S. 315 (1951)	5, 16
Gertz v. Welch, Inc., 418 U.S. 323 (1974)	8, 10, 11, 14, 18
Goldwater v. Ginzburg, 414 F.2d 324 (2d Cir. 1969), cert. denied 396 U.S. 1049 (1970)	6
Grayned v. Rockford, 408 U.S. 104 (1972)	5, 16
Griswold v. Connecticut, 381 U.S. 479 (1965)	12
Jenkins v. Georgia, 418 U.S. 153 (1974)	16, 17, 20
Melvin v. Reid, 112 Cal.App. 285 (1931)	12, 13
Miller v. California, 413 U.S. 15 (1973)	5, 16, 17
New York Times v. Sullivan, 376 U.S. 254 (1964)	10, 16
New York Times Co. v. United States, 403 U.S. 713 (1971)	5
Pearson v. Dodd, 410 F.2d 701 (D.C. Cir. 1969)	3
Poller v. C.B.S., 368 U.S. 464 (1962)	6
Time, Inc. v. Firestone, ... U.S. ....., 96 S.Ct. 958 (1975)	8, 10, 11, 14, 18, 20
Time, Inc. v. Hill, 385 U.S. 374 (1967)	11, 17, 18
Time, Inc. v. McLaney, 406 F.2d 565 (5th Cir. 1969)	22

Pages

United States v. Diebold, Inc., 369 U.S. 654 (1962) 6

Wasserman v. Time, Inc., 424 F.2d 920 (D.C. Cir. 1970).. 22
White v. Davis, 13 Cal.3d 757, 533 P.2d 222 (1975) 3, 12

Constitutions

California Constitution, Art. 1, Sec. 1 ..... 3, 12

United States Constitution:
First Amendment 4, 5, 8, 9, 15, 16, 19, 20, 21, 22
Seventh Amendment 20

Statutes

Civil Rights Act, Section 812 (42 U.S.C. §3612) 21

Texts

Bloustein, Privacy As an Aspect of Human Dignity, 39 N.Y.U.L.Rev., pp. 962, 981 (1964) 12

Gross, The Concept of Privacy, 42 N.Y.U.L.Rev. 34 (1967) 12

Nimmer, The Right to Speak From Times to Time, 56 Calif.L.Rev., pp. 935, 958-959 (1968) 12

Prosser, Law of Torts (4th ed. 1971), pp. 804-814 ..... 3, 12

Prosser, Privacy, 48 Calif.L.Rev., pp. 383, 389 (1960) 12

Sports Illustrated Magazine, "The Closest Thing to Being Born," Feb. 22, 1971 6

Warren and Brandeis, The Right of Privacy, 4 Harv.L. Rev. 193 (1890) 12, 13

Westin, Privacy and Freedom (1967) 12

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

I

PRELIMINARY STATEMENT

Throughout its petition, Time, Incorporated (hereinafter "Time"), openly recognizes and concedes that the First Amendment does not preclude liability for any and all truthful invasions of privacy. It concedes that some privacy tort actions are cognizable ". . . in order to preserve a proper balance between the rights of the individual and the rights of the press." [Petition, at page 3.] The issues upon which Time focuses, then, relate to the standard of liability for the tort

of invasion of privacy and the role of the jury in applying that standard. As will be shown, the rulings of the District Court and the Ninth Circuit below (and California law upon which they are based) correctly reflect the principles articulated and applied by this Court in analogous First Amendment decisions. The grant of certiorari is thus not appropriate. This case was filed in 1971 nearly five years ago and the pretrial appellate process has already caused great delay and prejudice to plaintiff-respondent Michael S. Virgil ("Virgil"). Denial of certiorari will permit the case to proceed to a trial in which the facts and issues can be more fully developed so as to provide a more complete record for the resolution of the constitutional and tort issues involved.[1]

II

THE NATURE OF THE PRESENT CASE

The present case is a tort action filed by respondent Virgil against petitioner Time arising out of the publication of an article in Sports Illustrated on February 22, 1971. Virgil alleges that Time, by publication of certain of the personal facts stated in the article, has maliciously invaded his privacy by in-

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[1] In this respect, see the dissenting opinion of Mr. Justice Rehnquist in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029 at pages 1053-1054 and cases there cited. This Court should not review a case and anticipate a question of constitutional law in advance of the necessity of deciding it. This principle is particularly compelling in a case such as ours where a more complete factual and evidentiary development could clarify the legal-constitutional issues involved.

trusion upon plaintiff's seclusion, solitude or private affairs [see: Prosser, Law of Torts (4th ed. 1971) at pages 804-814; *Dietman v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971); *Pearson v. Dodd*, 410 F.2d 701 (D.C. Cir. 1969)] and by public disclosure of embarrassing personal private facts concerning him. [See: *Briscoe v. Readers Digest Association, Inc.*, 4 Cal.3d 529, 483 P.2d 34 (1971).] Virgil has also alleged a claim against respondent for intentional infliction of emotional distress.

The State of California, through its highest Court, has articulated a policy in favor of protecting an individual's justified expectations of privacy.[2] Moreover, the California courts have recognized the plaintiff's right to trial by jury in such tort actions. As will be shown, Time's assertions that the standards governing such invasion of privacy actions and the right to trial by jury in such cases impairs protected First Amendment publications are wholly without merit.

The rules and principles formulated by the California courts and by the Ninth Circuit below offer the maximum amount of judicial protection for publications consistent with an individual's interest in privacy and his constitutional right to trial by jury in vindicating improper invasions of that privacy.

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[2]That the tort of invasion of privacy is but one manifestation of the State of California's enthusiastic and laudatory commitment to protection of privacy is evidenced by the recent adoption by the voters of California of a state constitutional amendment guaranteeing the right of privacy as an "inalienable right" for all individuals. California Constitution, Article I, Section 1; see also *White v. Davis*, 13 Cal.3d 757, 533 P.2d 222 (1975).

As will be demonstrated herein, the ruling of the Ninth Circuit below, particularly in its reliance on *Briscoe, supra,* does not undermine the freedom of press or the right of the press to publish newsworthy events. Rather, the Court below rejects petitioner Time's near absolutist view of the publisher's right and recognizes that—as in other First Amendment contexts—a jury is the proper fact-finder in the first instance for determining crucial facts relevant to the issue of whether or not a speech or publication is constitutionally protected.

In its petition, Time makes the unsupported and unsupportable statement that it would be "pernicious to freedom of the press" to permit "after-the-fact determinations of judges and juries as to what facts the public 'is entitled' to have and what facts the public should not have because they are 'offensive'" [Petition, p. 11]. Through this statement, Time shows its true colors. It rejects the right of any court—judge or jury—to restrict its right to publish "true" facts—irrespective of the newsworthiness or the extent to which those facts which are private and personal constitute an "offensive" *and unjustified* invasion of a plaintiff's proper expectations of privacy. In short, petitioner Time is, in reality, requesting this Court to abolish the tort of invasion of privacy in the area of publication of personal, private facts which are true. For if the existence of such a tort is recognized (as Time elsewhere in its petition concedes), then "after-the-fact determinations of judges and juries" must be made as to whether a truthful

publication improperly invaded a plaintiff's protected interest in privacy. [See the opinion of the Court of Appeals below, 527 F.2d at p. 1128.]

Indeed, such "after-the-fact" determinations have been common and permissible in other First Amendment cases before this Court. A jury or judge will often be called upon, after a speech, to determine whether the speaker created a clear and present danger of a riot or breach of peace [see, e.g., *Feiner v. New York,* 340 U.S. 315 (1951)], or an interference with the peaceful and orderly functions of a classroom or school session [*Grayned v. Rockford,* 408 U.S. 104 (1972)], or whether he uttered or published offensive "fighting words" [*Chaplinsky v. New Hampshire,* 315 U.S. 568 (1942)], or "obscenity" [*Miller v. California,* 413 U.S. 15 (1973)], or whether the publication constituted such an abuse of governmental processes as to violate antitrust laws [*California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508 (1972)].

In each of the above-cited cases and others too numerous to cite, this Court has ruled that a speaker or publisher may speak out on whatever subject he or she chooses. The Court is most reluctant to allow any prior restraint on the speech [*New York Times Co. v. United States,* 403 U.S. 713 (1971)]. But if that speech or publication becomes the basis of an "after-the-fact" civil or criminal action, then a court (and most often a jury) will be required to decide whether the speech or publication falls within the protected area of the First Amendment or whether it violates

a state or private interest which justifies imposition of civil or criminal sanctions.

The rulings of the District Court and Court of Appeals below, then, follow the established and unbroken line of above-cited decisions by this Court.

III

THE SCOPE OF THE INVASION OF PRIVACY IN THE PRESENT CASE

Inasmuch as this case comes before the Court in the posture of a review of Time's motion for summary judgment, the facts of the case must be appraised in the light most favorable to respondent Virgil. *United States v. Diebold, Inc.*, 369 U.S. 654 (1962); *Poller v. C.B.S.*, 368 U.S. 464, 473 (1962); *Goldwater v. Ginzburg*, 414 F.2d 324, 337 (2d Cir. 1969), *cert. denied* 396 U.S. 1049 (1970). The facts of the case were stated by the District Court and Court of Appeals below. (See Petition, Appendix A, pages A2-A4; and Appendix C, pages C1-C5.)

In an article which appeared in the February 22, 1971, issue of *Sports Illustrated Magazine* entitled "The Closest Thing to Being Born," petitioner briefly mentioned the respondent's prowess as a body surfer and then launched into a long article setting forth intimate details about respondent's private life that had nothing to do with the sport of body surfing. Throughout the article, it described Virgil as a "wild man" and "animal" and in general characterized him as "being abnormal." It also sets forth many other embarrassing private facts about his early life such

BLEED THROUGH

as: the fact that he allegedly extinguished cigarettes in his mouth; deliberately burned holes in his hands; dove headfirst down stairs to impress girls; that he ate insects off the wall and floor; that he, in a fit of anger, bit off a Negro's cheek; and that while a youth, he dove off billboards to deliberately injure himself so that he could collect unemployment compensation.

Virgil contends that these facts, even if true, were fraudulently obtained, and that the publication of these characterizations of Virgil is an unwarranted invasion of his right to privacy, and that petitioner has intentionally inflicted upon respondent emotional distress; further, Virgil contends that all of these acts were done maliciously by petitioner.

The evidence will show that petitioner obtained much of this information from acquaintances of Virgil's. Moreover, the personal information which the reporter pried from Virgil himself was given under an expectation of privacy. The complaint alleges, and the Court must accept as true for purposes of Time's summary judgment motion, that Virgil believed that his name would be used only in connection with identifying him as a body-surfer (the subject matter of the article). Virgil was unaware that the article's coverage of him would emphasize personal and embarrassing incidents of his adolescence. As stated in the opinion of the District Court, below (see Petition, Appendix C, page C7): "The complaint further alleges that the plaintiff never consented to the publication of any facts 'pertaining to his personal life or personal characteristics.'"

IV

ARGUMENT IN OPPOSITION TO PETITION FOR CERTIORARI

A. THE STANDARDS FOR DEFINING THE TORT OF INVASION OF PRIVACY AS ARTICULATED BY THE COURT BELOW—AS WELL AS THE RULINGS OF THE CALIFORNIA SUPREME COURT—ARE CONSISTENT WITH THIS COURT'S PRIOR RULINGS IN ANALOGOUS FIRST AMENDMENT CASES.

Petitioner Time raises numerous speculative "reasons" as to why the standards for invasion of privacy actions, as articulated by the courts below, jeopardize the First Amendment freedoms of speech or press. The fears and forecasts of doom are fantasized or—at best—gross exaggerations espoused by a publishing company which would have this Court define as "newsworthy" anything which the media decides to publish. That view of "newsworthiness" has been rejected by this Court. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and, more recently, *Time, Inc. v. Firestone*, ... U.S. ....., 96 S.Ct. 958, 965 (1976). Let us look more closely at the standard which the California Supreme Court (which, it must be recognized, is a court that has been most willing to afford protection to First Amendment freedoms) and the Court below have developed.

Contrary to petitioner Time's argument, the Court of Appeals below did not rule that a publisher could be liable for publication of newsworthy truthful facts.[3] Indeed, the crux of the Court of Appeals opin-

[3]Petitioner's argument (at pages 11-12) that the Court of Appeals relied on an outdated draft of the Restatement of Torts is wholly without merit. Indeed, the Court below relied on Tentative Draft No. 21 (1975) throughout its opinion and emphasized

BLEED THROUGH

ion is that a publisher has a First Amendment right to report any and all truthful facts, including private personal facts about an individual, which are newsworthy. In so ruling, the Court below expressly followed this Court's recent ruling in *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975).

Petitioner's repeated suggestion that the ruling of the Court of Appeals below subjects it to liability for publication of truthful newsworthy facts is so erroneous as to border on a dishonest characterization of the Ninth Circuit's opinion. Time and time again, the Court of Appeals makes it clear that a publisher cannot be liable for publication of truthful, newsworthy facts. For example:

> "To test the validity of such a rule, we might start with the public's right to know under the First Amendment. Does the spirit of the Bill of Rights require that individuals be free to pry into the *unnewsworthy private affairs* of their fellowmen? In our view it does not." 527 F.2d at page 1128. [Emphasis added.]

And further:

> "We conclude that unless it be privileged as *newsworthy* . . . The publicizing of private facts is not protected by the First Amendment." 527 F.2d at page 1128. [Emphasis added.]

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that the 1975 draft precluded liability for any truthful publication of newsworthy facts. The Court went even further and ruled that the 1975 draft embodied a constitutional standard dictated by the First Amendment. [See 527 F.2d at pp. 1128-1129.] Commentary from the older Restatement Draft No. 13 (1967) was used merely for purposes of illustration, the Court noting that it used only those illustrations from the 1967 draft which were not substantively changed by the newer 1975 draft. [See footnote 10 of the Court of Appeals opinion, 527 F.2d at p. 1129.]

And finally:

> "The privilege to publicize newsworthy matters is included in the definition of the tort set out in Restatement . . . . Liability may be imposed for an invasion of privacy only if 'the matter publicized is of a kind which . . . is not of legitimate concern to the public.'" 527 F.2d at pages 1128-1129.

Thus, it is clear that the Court of Appeals below recognized that the First Amendment establishes constitutional protection for the publication of truthful, newsworthy facts even if such are embarrassing to a private plaintiff. If, as respondent Virgil contends in our present case, the facts publicized are not newsworthy or related to a public official or public figure or derived from public records, then an invasion of privacy action is not precluded by the First Amendment. As the Ninth Circuit so accurately observed: "In our view fairly defined areas of privacy must have the protection of law if the quality of life is to continue to be acceptable." 527 F.2d at page 1128.

This Court has taken a similar view in refusing to apply the strict standards of *New York Times v. Sullivan*, 376 U.S. 254 (1964), to private defamation actions brought by nonpublic figures and nonnewsworthy plaintiffs. *Gertz v. Welch, Inc.*, 418 U.S. 323 (1974); *Time, Inc. v. Firestone, supra.* In *Gertz* and *Firestone*, just as in our present case, the publishers took the view that the individual who was the subject matter of the publication was newsworthy or a public figure. In both cases this Court disagreed.

Respondent Virgil and his past life are even less newsworthy than the plaintiffs and their activities in *Gertz* and *Firestone*. The article in *Gertz* purported to be based in part on a murder trial of a Chicago police officer. 418 U.S. at pages 325-326. The article in *Firestone* purported to be a direct report of a judicial proceeding. 96 S.Ct. at pages 965-967. In *Firestone* this Court nevertheless specifically rejected the view that the First Amendment requires deference to the editorial judgment of the publisher in defining what is newsworthy:

> ". . . petitioner seeks to equate 'public controversy' with all controversies of interest to the public. Were we to accept this reasoning, we would reinstate the doctrine advanced in the plurality opinion in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971) . . . . In *Gertz*, however, the Court repudiated this position stating that 'extension of the *New York Times* test proposed by the *Rosenbloom* plurality would abridge a legitimate state interest to a degree that we find unacceptable. 418 U.S. at 346." See *Firestone*, 96 S.Ct. at page 965.

Just as deference to the publisher's editorial judgment as to whom or what is "newsworthy" would unduly abridge the state's legitimate interest in protecting private reputations from defamation, so also would it impair the states' interest in protecting the right of individual privacy from unwarranted and unjustified invasion. This is an interest recognized by all but a few jurisdictions in the United States.[4]

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[4] *Time, Inc. v. Hill*, 385 U.S. 374, 383 (1967); *Cox Broadcasting Corp. v. Cohn*, 95 S.Ct. at p. 1043.

In *Cox Broadcasting Corp. v. Cohn, supra,* this Court recognized the ". . . impressive credentials for a right of privacy." 95 S.Ct. at page 1043. The importance of the "right to be let alone" as articulated in the celebrated article by Warren and Brandeis, The Right of Privacy, 4 Harv.L.Rev. 193 (1890), and echoed and embellished by an impressive array of legal scholars since cannot be ignored. The right of privacy has been recognized as creating a zone of privacy which protects each individual from unwarranted intrusions by the government, the press and other private entities.[5]

As mentioned earlier herein, California has been particularly concerned with protecting individuals from invasions of privacy by government and the private sector. California Constitution, Article 1, Section 1 (defining privacy as an "inalienable right"); *White v. Davis,* 13 Cal.3d 757, 533 P.2d 222 (1975); *Melvin v. Reid,* 112 Cal.App. 285 (1931). In *Briscoe v. Readers Digest Ass'n., Inc., supra,* the Supreme Court of California recognized that the tort action

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[5]See the authorities cited in Mr. Justice White's opinion for the Court in *Cox Broadcasting Corp. v. Cohn, supra,* 95 S.Ct. at pages 1042-1043. See also: *Griswold v. Connecticut,* 381 U.S. 479 (1965); Prosser, Law of Torts (4th Ed., 1971), 804-814; Prosser, Privacy, 48 Calif.L.Rev. 383, 389 (1960); Westin, Privacy and Freedom (1967); Gross, The Concept of Privacy, 42 N.Y.U.L.Rev. 34 (1967); Nimmer, The Right to Speak From *Times* to *Time,* 56 Calif.L.Rev. 935, 958-959 (1968): "The right of privacy protects not reputation, but the interest in maintaining the privacy of certain facts. Public disclosure of such facts can create injury regardless of whether such disclosure affects the subject's reputation. *The injury is to a man's interest in maintaining a haven from society's searching eye* . . . . 'The gravamen in the public disclosure cases [privacy] is degrading a person by laying his life open to public view.' " (Citing Bloustein, Privacy As an Aspect of Human Dignity, 39 N.Y.U.L.Rev. 962, 981 (1964).

BLEED THROUGH

for invasion of privacy must be reconciled with First Amendment freedoms of speech and press. In *Briscoe*, the Court noted that the right to privacy is an integral component for the protection of human dignity and that the need for this protection increases as our society grows more crowded and complex:

> "Acceptance of the right to privacy has grown with the increasing capability of the mass media and electronic devices . . . capacity to destroy an individual's anonymity, intrude upon his most intimate activities and expose his most personal characteristics to public gaze." 4 Cal.3d at page 533.

Nevertheless, while recognizing that the tort of invasion of privacy protected important and significant interests and has been established in California since 1931 (see *Melvin v. Reid, supra*), the *Briscoe* court explicitly noted that privacy must give way as to matters of "public or general interest," citing Warren and Brandeis, *supra*, 4 Harv.L.Rev. at page 214. In this respect, publications are not limited to public officials or figures but rather:

> "Freedom of discussions must embrace all issues about which information is needed or appropriate to enable a society to cope with the exigencies of their period . . . . [citing *Thornhill v. Alabama*, 310 U.S. 88 (1940), and *Time, Inc. v. Hill, supra*]. The scope of the privilege thus extends to reporting of *recent events*, even though it involves publication of a purely private individual's name or likeness [citing, *inter alia*, *Winters v. New York*, 333 U.S. 507 (1948)]." 4 Cal.3d at page 535. [Emphasis added.]

The *Briscoe* case, like our present one, involved publication of highly personal and very embarrassing facts about the plaintiff which occurred many years in the past. [In *Briscoe*, that plaintiff had been involved in and convicted for a hijacking offense eleven years earlier.] In our present case, as in *Briscoe*, the plaintiff had attempted to put his past behind him, to adapt to and pursue his present role as a family man and a respected member of his community, social and religious organizations. The unwanted and unjustified publicity concerning respondent Virgil's adolescent escapades interfered with these proper pursuits.

The private nature of the facts involved and their lack of newsworthy value are even more clear in our case than in *Briscoe*, *Gertz* or *Firestone*. For here, the article was not a report based on public records which contained the name of the plaintiff. Compare: *Cox Broadcasting Corp. v. Cohn*, *supra*.

The California standard for invasion of privacy suits, as refined by the Court of Appeals opinion below, thus establishes maximum leeway for free press consistent with the recognition of the legitimate state interest in protecting the privacy of citizens. That standard prohibits liability for publication of newsworthy facts, or of matters pertaining to public officials or public figures, or for references to the identity of or facts about an individual which are contained in judicial or other public records.[6] The *Bris-*

[6]While this latter limitation was not expressly spelled out in the *Briscoe* opinion, it clearly was included in the ruling of the

coe court went on to establish guidelines for the jury to consider in defining whether a publication is newsworthy:

> "We have previously set forth criteria for determining whether an incident is newsworthy. We consider '[1] the social value of the facts published, [2] the depth of the article's intrusion into ostensibly private affairs, and [3] the extent to which the party voluntarily acceded to a position of public notoriety. [Citations.]' (*Kapellas v. Kofman*, 1 Cal.3d 20, 36 [81 Cal.Rptr. 360, 459 P.2d 912].)" [4 Cal.3d at page 541.]

Finally, to insure maximum protection for freedom of the press, the *Briscoe* court requires a plaintiff, in order to successfully maintain an invasion of privacy action, to prove that the publisher invaded his privacy with reckless disregard for the fact that reasonable men would find the invasion highly offensive. 4 Cal.3d at pages 542-543.

Inasmuch as the Court of Appeals below adopted all of the First Amendment protections of the *Briscoe* opinion as well as those added in *Cox Broadcasting Corp. v. Cohn*, *supra*, the standard developed complies with First Amendment precedents, principles and policies as developed by this Court. Accordingly, Time's petition for a writ of certiorari should be denied.

Ninth Circuit Court of Appeals in our present case as is demonstrated by that Court's citation of and reliance upon *Cox Broadcasting Corp. v. Cohn*, *supra*. See *Virgil* opinion, 527 F.2d at page 1127.

B. THE COURTS BELOW PROPERLY RECOGNIZED THAT THE STANDARD FOR INVASION OF PRIVACY LIABILITY SHOULD, WHERE THERE ARE GENUINE ISSUES OF FACT, BE APPLIED IN THE FIRST INSTANCE BY THE JURY.

As previously stated, petitioner Time's argument that the jury must not be allowed to resolve constitutional facts relevant to determining First Amendment questions fails to recognize the numerous decisions of this Court to the contrary. Thus, juries must find whether a speech or publication constituted a clear and present danger of breach of peace, or interference with school sessions or interference with the administration of justice. See *Feiner v. New York, supra; Grayned v. Rockford, supra; Craig v. Harney,* 331 U.S. 367 (1947). Juries decide, in the first instance, whether a publication is obscene. *Miller v. California, supra.* Indeed, under *New York Times v. Sullivan, supra,* and its progeny, a jury is to determine whether a defendant published material with "actual malice" (i.e., knowledge that it was false or reckless disregard for its truth or falsity).

Of course, the juries' findings in such cases are referred to as "constitutional facts" and the trial court and appellate courts have the power to review such findings and set them aside if they improperly abridge First Amendment freedoms. See, e.g., *Edwards v. So. Carolina,* 372 U.S. 229 (1963); *Jenkins v. Georgia,* 418 U.S. 153 (1974).

The Court of Appeals, below, recognized that the determination of newsworthiness takes into account community standards as to when the information published is of public interest as opposed to when

BLEED THROUGH

it is an unjustified offensive prying into a plaintiff's private life. 527 F.2d at page 1129. This concept of offensiveness is one which is a component of the California law on invasion of privacy, see *Briscoe v. Readers Digest Ass'n., Inc., supra*, as well as being central to this Court's guidelines for privacy actions. See *Time, Inc. v. Hill*, 385 U.S. at p. 383:

> "This limitation to newsworthy persons and events does not of course foreclose an interpretation . . . to allow damages where 'revelations may be so intimate and unwarranted in view of the victim's position as to outrage the community's notions of decency.'"

The Court of Appeals thus recognized that the appraisal of community standards is a role which is best filled, in the first instance, by the jury (citing *Miller v. California, supra*), subject to close judicial scrutiny (citing *Jenkins v. Georgia, supra*). 527 F.2d at page 1129.

In its petition (at page 16), Time cites numerous cases in which this Court has ruled against a publisher's liability for defamation as a matter of law. Neither the respondent nor the opinion of the Court of Appeals below dispute the point that there are many cases in which issues as to defamation, falsity, actual malice and the like can be ruled on as a matter of law. Similarly, there will be cases in which the newsworthy value of a fact or person can be determined as a matter of law. [See, e.g., *Cox Broadcasting Corp. v. Cohn, supra.*] If such an inquiry was to be made in our case, it would seem that the Court should

find that respondent Virgil's past activities were not newsworthy in that he was less of a public figure and his past conduct was of less public interest than that of the plaintiffs in *Gertz* and *Firestone*. However, the point is that such determinations should be left to the jury. As this Court stated in *Time, Inc. v. Hill, supra*, 385 U.S. at page 391:

> "Turning to the facts of the present case, the proofs reasonably would support either a jury finding of innocent or merely negligent mistatement by Life, or a finding that Life portrayed the play as a re-enactment of the Hill family's experience reckless of the truth or with actual knowledge that the portrayal was false."

Most recently in *Time, Inc. v. Firestone, supra*, this Court once again upheld the role of the jury in determining liability for publication of false and defamatory information. Indeed, the Court deferred to the jury determination that Time's interpretation of a complex and ambiguous divorce decree was false even though if that interpretation had been true, the publication would have been protected by the First Amendment. 96 S.Ct. at page 967:

> "In its view the Time article faithfully reproduced the precise meaning of the divorce judgment. But this issue was submitted to the jury under an instruction intended to implement Florida's limited privilege for accurate reports of judicial proceedings. App. 509; see 305 So.2d at 177. By returning a verdict for respondent *the jury necessarily found that the identity of meaning which petitioner claims does not exist even for laymen.* The Supreme Court of Florida

> upheld this finding on appeal, rejecting petitioner's contention that its report was accurate as a matter of law. Because demonstration that an article was true would seem to preclude finding the publisher at fault, see *Cox Broadcasting Co.*, 420 U.S., at 498-500, 95 S.Ct., at 1047 (Powell, J., concurring), we have examined the predicate for petitioner's contention. We believe the Florida courts properly could have found the "Milestones" item to be false." [Emphasis added.]

The above-quoted passage establishes this Court's recognition of the role of the jury in First Amendment cases, particularly where the jury determination involves consideration of community standards and the impact of an article on or its interpretation by laymen.

In *Briscoe*, the California Supreme Court identified the questions for jury determination as follows (4 Cal.3d at page 543):

> "We do not hold today that plaintiff must prevail in his action. It is for the trier of fact to determine (1) whether plaintiff had become a rehabilitated member of society, (2) whether identifying him as a former criminal would be highly offensive and injurious to the reasonable man, (3) whether defendant published this information with a reckless disregard for its offensiveness, and (4) whether any independent justification for printing plaintiff's identity existed."

The questions for the jury in our case are similar except, of course, that plaintiff-respondent Virgil is not a former convicted criminal. Nevertheless, the

jury would be called upon to decide whether Virgil had reformed from his adolescent ways, whether the re-counting of his past exploits was highly offensive and injurious to the reasonable person, and if so, whether publication was with reckless disregard (actual malice) as to its offensiveness. Submitting these questions to the jury in privacy cases is no more endangering to First Amendment freedoms than submitting issues of falsity, defamatory meaning and reckless disregard (actual malice to juries in libel cases under the *New York Times* line of cases. See *Time, Inc. v. Firestone, supra*, 96 S.Ct. at page 967.

Finally petitioner Time seems to argue that this Court should not trust juries to faithfully resolve the issues here presented. The suggestion is that a jury, under the cloak of anonymity of the general verdict, will censor protected publications. This argument has already been shown to be fallacious; juries commonly resolve factual issues in speech cases and the special scrutiny which trial and appellate courts give to findings of constitutional facts insures that the jury verdict will not be a shield for censorship of speeches and publications protected by the First Amendment. See *Jenkins v. Georgia, supra.*

In addition, this Court has recently recognized that the Seventh Amendment right to trial by jury could not be denied on the basis of one party's speculative fear that a jury is unable or unwilling to perform its duty. *Curtis v. Loether*, 415 U.S. 189 (1974). In *Curtis*, this Court ruled that parties in federal litigation had a constitutional right to trial by jury in an

action sounding in tort (there an action under Section 812 of the Civil Rights Act, 42 U.S.C. §3612). Just as Time here argues that the jury may abuse its power by finding liability for protected speech, petitioner in *Curtis* argued that racially discriminatory jurors could abuse their power by improperly denying civil rights claims. Mr. Justice Marshall, for a unanimous Court, responded in favor of trial by jury (415 U.S. at page 198):

> "We are not oblivious to the force of petitioner's policy arguments . . . . We recognize, too, the possibility that jury prejudice may deprive a victim of discrimination of the verdict to which he or she is entitled. Of course, the trial judge's power to direct a verdict, to grant judgment notwithstanding the verdict, or to grant a new trial provides substantial protection against this risk, and respondents' suggestion that jury trials will expose a broader segment of the populace to the example of the federal civil rights laws in operation has some force. More fundamentally, however, these considerations are insufficient to overcome the clear command of the Seventh Amendment."

Thus, the opinion of the Court of Appeals in our case correctly reflects concern for the First Amendment freedoms, as well as respondent Virgil's right to seek a remedy for alleged invasion of privacy through his constitutional right to trial by jury. The opinion of the Court of Appeals and the law of California upon which it is based are consistent with the governing principles of First Amendment law as reflected in prior decisions of this Court. Therefore,

the petition for writ of certiorari should not be granted in this case.

Petitioner Time suggests that the ruling of the Ninth Circuit Court of Appeals below conflicts with *Wasserman v. Time, Inc.*, 424 F.2d 920 (D.C. Cir. 1970) and *Bon-Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858 (5th Cir. 1970). However, neither of those cases involved invasion of privacy actions; and both are in conflict with other rulings in their own respective circuits. For example, the Fifth Circuit has recognized the role of the jury in libel cases. See *Time, Inc. v. McLaney*, 406 F.2d 565, 572 (5th Cir. 1969). And in the area of privacy, the District of Columbia Circuit sitting *en banc*, has recognized that a tort action for invasion of privacy is not precluded by the First Amendment. See *Afro-American Publishing Co. v. Jaffe*, 366 F.2d 649, 654 (D.C. Cir. 1966), a case cited by and relied upon by the Court of Appeals, below. (Petition, Appendix A, page A-11.)

Thus, petitioner is unable to show a conflict in the Circuits concerning the existence of the tort of invasion of privacy or the role of the jury in determining liability in the first instance. To the extent that the *Wasserman* and *Bon-Air Hotel* cases take a different view on the role of the jury in defamation cases, those decisions are inconsistent with the rulings and governing principles enunciated by this Court. Review by Certiorari should be reserved for cases such as *Wasserman*, *Bon-Air Hotel* or their progeny and not for our present case which carefully follows the precedents and principles established by this Court.

BLEED THROUGH

V

CONCLUSION

For the reasons stated above, this Honorable Court should deny Time, Inc.'s petition for Writ of Certiorari and allow the litigation below, which has already been delayed for nearly five years by the present pre-trial appeal, to proceed.

Dated, April 30, 1976.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1174

TIME, INC.,

Petitioner,

v.

MICHAEL S. VIRGIL,

Respondent.

PETITIONER'S REPLY

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PETITIONER'S REPLY

STATEMENT

Respondent's brief in opposition is in error concerning and makes unfounded factual statements as to the basis of this action. It also ignores the basic questions before this Court as to definition of a standard of constitutional protection for truthful public disclosure of private facts and whether application of that standard is a question of law for a court or a question of fact for a jury. Thus this brief reply memorandum.

Erroneous characterization of the nature of this action (br. pp. 2-3).

The Ninth Circuit correctly stated that the basic question presented is as to "a standard for newsworthiness" for public disclosure of private facts (App. A, p. 14).*

Respondent now seeks to broaden the basis of his claimed cause of action for public disclosure of private facts and asserts in this Court abandoned and inapposite claims which the Ninth Circuit clearly noted as having been dismissed from the case (App. A, fn. 3, p. 6). He now states (br. p. 3) that he is also seeking to recover for "intrusion" and for "intentional infliction of emotional distress". Neither of these dismissed claims has any substance in this Court.

With respect to intrusion, respondent cites (br. p. 3) *Dietemann* v. *Time, Inc.*, 449 F. 2d 245 (9th Cir. 1971) and *Pearson* v. *Dodd*, 410 F. 2d 701 (D. C. Cir. 1969), *cert. denied*, 395 U. S. 947. Both those cases made crystal clear that publication, which is the only basis upon which respondent seeks to recover, has nothing whatsoever to do with "intrusion" since that tort deals solely with an actual physical invasion into a private premise. Both cases rule that there is no tort cause of action for intrusion privacy based upon publication.

With respect to intentional infliction of emotional distress, the Ninth Circuit made clear in its opinion (App. A, fn. 3, p. 6) that such a cause of action could be founded "only in cases of extreme or outrageous conduct" and that "such conduct, apart from the invasion of privacy by the publication of private facts, is not present here".

Fraud (br. p. 7).

Respondent now claims (br. p. 7) that the private facts as to respondent "were fraudulently obtained" and that "Virgil was unaware that the article's coverage of him would emphasize personal and embarrassing incidents of his adolescence".

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*The Ninth Circuit opinion is now officially reported at 527 F. 2d 1122.

BLEED THROUGH

The Ninth Circuit dealt with and rejected both those claims as pointed out in our petition (p. 6). Thus, it found specifically that the private facts information "was obtained without commission of a tort and in a manner wholly unobjectionable" (App. A, p. 8) and that petitioner's reporter "did not intrude on appellee's solitude and that all interviews were freely given" (App. A, fn. 3, p. 6). There is clearly no factual basis for respondent's claim of fraud on the record here. Indeed, when the District Court questioned respondent's counsel at argument in order to ascertain the factual basis for the claim (Record —Vol. III, pp. 45-59), respondent was unable to specify any factual basis for that bald statement other than his assertion in the complaint (and respondent filed no affidavit or other proof) which was plainly contradicted by the Kirkpatrick affidavit (Record—Vol. I, p. 92):

> "In my interviews with Virgil, as in my conversations with all of the persons whom I interviewed, I made it perfectly clear that I was writing an article for Sports Illustrated and would incorporate our interviews into that article."

A standard for "newsworthiness" (br. pp. 8-15).

This entire point assumes that the facts as to respondent were not "newsworthy" but makes no attempt whatsoever to set the *constitutional standard* upon which such a finding must be based. But, that is the very question before this Court.

A question of law or fact (br. pp. 16-22).

Respondent, in his attempt to give everything to a jury, ignores the very patent fact that there must always be an initial question of First Amendment law for a court to decide prior to giving the case to a jury.* Thus, *Hill* decided "pub-

*Respondent also argues that he is not a "public figure" (br. p. 18), a posture which we have accepted throughout our petition so that this case comes to this Court on the basis that respondent is not a public figure.

lic interest" as a matter of law, *Cantrell* decided "editor's discretion" as a matter of law and *Miller* decided "commerce in ideas" as a matter of law prior to there being anything for a jury to pass upon.* True indeed, in *Miller,* there were many facets in the case for a jury but not until after the court had decided the initial question of law that the material before the court constituted "commercial exploitation of obscene material" rather than "commerce in ideas".

CONCLUSION

For the reasons stated here, and in our petition, the petition should be granted.

May 5, 1976.

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**Time, Inc.* v. *Hill,* 385 U. S. 374; *Cantrell* v. *Forest City Publishing Co.,* 484 F. 2d 150 (6th Cir. 1973), *rev'd and remanded,* 419 U. S. 245; *Miller* v. *California,* 413 U. S. 15.

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